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AUTHOR Lufler, Henry S., Jr.
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ABSTRACT

This chapter, which reports on decisions made by federal and state courts in 1983 concerning the treatment of pupils, notes that for the first time in five years the number of such cases did not increase. Important decisions were handed down regarding student expression and concerning the payment of fees and damages in litigation affecting the placement and treatment of handicapped students. The number of desegregation cases is declining, though a trend is discernible toward "second generation" discriminatnion cases within formerly dual districts where systemwide desegregation has officially been achieved. Among other topics addressed are tuition, placement, the right to education, and discipline in cases involving handicapped and exceptional children; testing, placement, tuition, attendance, and transportation issues in public schools; bilingual and bicultural programs; state involvement with private and parochial schools; athletic association rules and sex discrimination in athletics; students' religious rights and freedom from undue search and seizure; and sanctions for student misconduct. (PGD)

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PUPILS

Henry S. Lufler, Jr.*

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EA 017 504

4.0 INTRODUCTION

Cases concerning the treatment of pupils continued to be decided in large numbers in 1983. For the first time in five years, however, the number did not increase over the previous year. Among the almost two hundred new cases reported in this chapter are important decisions in the areas of student expression and the payment of fees and damages in handicapped student placement and treatment litigation. The legal uncertainty regarding the availability of attorney fees and damages in such cases had led to an avalanche of lawsuits, with some resolution of the issue in sight.

Desegregation cases are declining in number, and some of the cases reported in this chapter tell of consent decrees or court rulings that school systems have achieved unitary status. While settlements have been reached in some cases, litigation started in the 1950s in the southern states under the jurisdiction of the Fifth Circuit Court of Appeals remains largely unresolved. In addition, a number of 1983 cases allege that school systems in the South that once were declared free of segregation have slipped back to dual system status. The segregation of minority students within certain programs in an otherwise desegregated system also led to a lawsuit in 1983. Such "second generation" discrimination cases are likely to be more common where systemwide desegregation is achieved.

4.1 HANDICAPPED AND EXCEPTIONAL CHILDREN

The avalanche of cases involving handicapped children continued unabated in 1983. Many of the cases reported in this section in recent years reached federal courts of appeals last year and many new cases were initiated. A new 1983 heading started in this section, attorney fees and damages, has expanded significantly as courts continue to wrestle with claims filed by successful litigants. While courts generally acknowledge that the Education for All Handicapped Children Act of 1975 (EHCA) does not provide for fees and damages, some have found that recovery is possible under sections 504 and 505 of the Rehabilitation Act of 1973 and under the Civil Rights Attorney's Fees Award Act.[1]

In 1982 the United States Supreme Court addressed the requirements of EHCA for the first time, deciding what was meant by the Act's call for "free appropriate public education" and what was to be the role of

1. 42. U.S.C.A. §§ 1983, 1988 (1976).

the courts in reviewing a handicapped child's placement or program.[2] The majority in *Rowley* concluded that handicapped children must receive "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[3] In requiring programs of "educational benefit" the Court rejected claims that students receive equal educational opportunity, a more costly option. Courts still must struggle with the "educational benefit" standard, as well as deciding what "related services" are required under EHCA. Both terms were the subject of considerable litigation in 1983.

Rowley requires school districts to provide handicapped children with an "individualized educational plan" (IEP) that is "reasonably calculated" to enable the child to achieve passing grades and advance from grade to grade.[4] Much of the early litigation following the passage of EHCA asked courts to decide on the merits of two IEPs, one developed by the school system and one by the parents. The *Rowley* majority instructed courts to avoid making such choices. Instead, courts should ensure that systems had followed the EHCA procedures in developing the IEP, including parental involvement and subsequent appeals to state educational agencies in cases of disagreement. The IEP must be calculated to provide the child with educational benefit. Assuming such factors are present and the procedures were followed, courts were instructed to avoid requiring alternative programs.

4.1a Tuition and Assignment

Lower courts applied the holdings in *Rowley* to settle a number of cases in 1983. Parents of a learning-disabled Maryland high school student filed suit when local school officials refused to fund the student's placement at a nonpublic school.[5] A hearing officer had concluded that a public school learning center was an adequate placement and this decision was sustained by the state board of education. The Fourth Circuit Court of Appeals, citing *Rowley*, concluded that "it does not follow that the less appropriate program is not 'appropriate' within the meaning of the Act."[6] Because the child would benefit from the public school program, the court dismissed the parents' suit.

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2. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).
3. *Id.* at 201.
4. *Id.* at 203-04.
5. Hessler v. State Bd. of Educ. of Maryland, 700 F.2d 134 (4th Cir. 1983).
6. *Id.* at 139.

Parents of an autistic Ohio student appealed a state-approved placement decision for their son, arguing that an alternative twelve-months placement lasting well beyond the student's twenty-first birthday would be more beneficial. The plaintiff's case was dismissed by a federal district court,[7] which examined the placement in great detail, and the parents appealed. In upholding the lower court, the Sixth Circuit Court of Appeals saw the plaintiff's arguments only as reflecting a difference of opinion as to the most effective teaching methods available to advance the student's education.[8] Because all EHCA procedures had been followed and the IEP had been found appropriate, the appeals court sustained the placement. The court did reverse a portion of the lower court's decision, holding that parents were not "support personnel" under the terms of EHCA and that the school district did not therefore have an obligation to provide them with special training to handle their child.

Parents of an eighteen-year-old emotionally disturbed child in Tennessee sought a placement at a private out-of-state facility, in the face of a local board decision to place the child in a state program.[9] The district court upheld the board's placement, noting that the student's lack of cooperation in the program selected could not serve as justification for ordering the alternative program. In a case with a reverse set of circumstances, Michigan parents argued that local mainstreaming was preferable for their daughter who suffered from cerebral palsy, while school officials concluded that a program in a school for those who are handicapped would be of greatest benefit.[10] Citing *Rowley*, the district court granted summary judgment for the school system, concluding that EHCA procedures had been followed fully.

The language of the *Rowley* decision makes it clear that not every student placement is adequate, but that programs must be reasonably calculated to enable students to receive educational benefits. In two separate cases, the First Circuit Court of Appeals concluded that school districts had not offered such programs. In the first, the appeals court upheld a district court decision ordering residential placements for learning disabled children instead of the self-contained special education classrooms favored by the district.[11] The Rhode Island State Commissioner of Education had overruled the district and concluded that the district's IEP for the students would not permit them to receive

7. Rettig v. Kent City School Dist., 539 F. Supp. 768 (N.D. Ohio 1981); *see* THE YEARBOOK OF SCHOOL LAW 1983 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1983] at 158.
8. Rettig v. Kent City School Dist., 720 F.2d 463 (6th Cir. 1983).
9. Clevenger v. Oak Ridge School Bd., 573 F. Supp. 349 (E.D. Tenn. 1983).
10. Johnston v. Ann Arbor Pub. Schools, 569 F. Supp. 1502 (E.D. Mich. 1983).
11. Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); *see* YEARBOOK 1983 at 154.

educational benefits. In the second fo the First Circuit cases, the appeals court concluded that a severely retarded child would not make any educational progress at all unless placed in a residential facility.[12] Claims that the child's needs were not "educational in nature" were rejected, as was the argument that the district court had exceeded its review powers as delineated in *Rowley*. In a similar case, the Nebraska Supreme Court modified an opinion following the publishing of the *Rowley* decision, but refused to rehear a case and continued to order residential treatment for a mentally retarded, autistic child because the alternative proposal offered the child no educational benefit.[13]

EHCA required that there be no change in the placement of the handicapped student during the administrative appeals process.[14] This "stay-put" requirement was affirmed by a 1980 Fourth Circuit Court of Appeals decision, which the United States Supreme Court declined to review.[15] Cases still challenge this requirement, often arguing that the timetable for the hearings—forty-five days for the formal hearing at the district level and state review within thirty days—has not been met. As a general rule, courts allow some flexibility in this schedule.

Six cases arguing the "stay-put" provision were decided by circuit courts of appeal in 1983. A California student exhibiting behavioral problems was expelled from the school he was attending and was unilaterally placed in another private school by his parents. The school district then recommended placement in a public school program while the parents continued the private school placement. While arguments were advanced over whether the district had approved the private school treatment, the appeals court refused to decide the issue, concluding that no claim for tuition could be made because the administrative appeal process had not been exhausted.[16] Unilateral transfers are possible, the court concluded, only when there was bad faith on the part of the school district in the placement process or the health of the student was threatened. Neither circumstance was present in this case.

A long-standing New York case was heard by the Second Circuit Court of Appeals.[17] The student, suffering from minimal brain dysfunction, was enrolled in a private school and was transferred by

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12. Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983).
13. Adams Cent. School Dist. No. 090 v. Deist, 338 N.W.2d 591 (Neb. 1983).
14. 20 U.S.C. § 1415(e)(3) (1976).
15. Stemple v. Board of Educ., Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).
16. Mountain View-Los Altos Union High School v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983).
17. Zvi D. v. Ambach, 694 F.2d 904 (2d mCir. 1982); *see* THE YEARBOOK OF SCHOOL LAW 1982 (P. Pitle, ed.) [hereinafter cited as YEARBOOK 1982] at 219-20.

his mother to another private school, at which time she requested a student evaluation. The district agreed to pay the tuition at the second school only for the rest of the school year while the evaluation was conducted. The evaluation concluded that a public school placement was appropriate, but the parent continued the private schooling while appealing the decision. The appeals court concluded that the district's willingness to let the child finish the school year at the second school did not obligate it to further funding because it was the parent's initial unilateral decision to change the placement that started the dispute.

Parents of a Virginia learning disabled student obtained an evaluation of their child to which they subsequently objected. They placed their son in a private school and sought payment from the school district. Though questions about the timing and adequacy of the district's alternative were raised, the Fourth Circuit Court of Appeals affirmed the "stay-put" requirement and denied the tuition request.[18] In a similar case, the Fifth Circuit Court of Appeals rejected a variety of claims for reimbursement filed by Texas parents who had disregarded their school district's IEP and had unilaterally placed their child in a private school.[19]

Another Texas case involving a placement move was heard by the Fifth Circuit Court of Appeals. A district court had issued a preliminary injunction ordering the Pasadena School District to pay the tuition charges for a severely handicapped child while the district was seeking a placement that would put the child into the public schools.[20] The district court concluded that the district had engaged in an administrative delay and that the child's handicaps were such that harm would result to the child as the result of public school placement. While the district court subsequently made its injunction permanent, the appeals court cited EHCA and rejected the district court's order on the tuition payment for the period before the issuance of the lower court's final order.[21] The case was remanded to the district court for further hearing on whether equitable relief should be granted.

In a Kentucky case, the "stay-put" provision was used by parents who challenged the closing of a state-operated day treatment facility.[22] The facility was closed for budgetary reasons. The district was not successful in convincing the Sixth Circuit Court of Appeals that the closing was not a change in placement, especially since children were being transferred from a twelve-months to a nine-months program. Claims

18. Rowe v. Henry Cty. School Bd., 718 F.2d 115 (4th Cir. 1983).
19. Marrion H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983).
20. Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982); *see* YEARBOOK 1983 at 152-53.
21. Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1983).
22. Tilton v. Jefferson Cty. Bd. of Educ., 705 F.2d 800 (6th Cir. 1983).

that the facility was not an "educational placement" also fell on deaf ears. On the narrow question of budgetary limitations, however, the appeals court concluded that the "stay-put" provision did not apply when an entire facility was closed and the court refused to order its reopening.

A deadlock in the development of an IEP for an Oklahoma emotionally disturbed student was broken when his parents unilaterally enrolled him in a private school. The school district had agreed to hire a teacher to instruct the child, but the parents disputed the person selected for the job on the grounds of lack of experience. A federal district court refused to order the district to fund the private placement.[23] In a New York case, parents similarly did not exhaust administrative appeals procedures before a unilateral private school placement.[24] Though the public school district had delayed for four months in finding a suitable placement, a district court concluded that state administrative proceedings should have been initiated to address the situation.

In one case in which the district had to pay tuition, the learning-disabled District of Columbia student was already enrolled in the private school. The defending school system had agreed to pay the student's tuition at the school, while seeking an alternative placement. There was no time limit attached to the agreement and thus the district court found that the district was obligated to continue the payment for the "current placement," even as the hearing process surrounding the student's IEP entered its second year.[25]

New York parents were unsuccessful in convincing a state appeals court that the transfer of their handicapped child from one private school to another should be approved because the schools were so similar that the new school should be considered the student's "current placement."[26] The court also concluded that the New York State Commissioner of Education could not approve tuition payments at a private school without conducting a due process hearing.

A variety of issues, including attempts by parents to claim a private school as their child's "current placement," were considered by a Massachusetts district court.[27] The case consolidated three cases, one being heard for the first time and two on remand from the First Circuit Court of Appeals.[28] All hinged on the interpretation of Massachusetts law and only one of the three cases was decided. The court concluded

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23. Cain v. Yukon Pub. Schools, 556 F. Supp. 605 (W.D. Okla. 1983).
24. Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).
25. Jacobsen v. District of Columbia Bd. of Educ., 564 F. Supp. 166 (D.D.C. 1983).
26. Lillian S. v. Ambach, 461 N.Y.S.2d 501 (N.Y. App. Div. 1983).
27. Doe v. Anrig, 561 F. Supp. 121 (D. Mass. 1983).
28. Angier v. Anrig, *heard with* Town of Burlington v. Department of Educ., 665 F.2d 428 (1st Cir. 1981); Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982); *see* YEARBOOK 1982 at 125 and YEARBOOK 1983 at 151.

that parents should be reimbursed for tuition costs under state law because the student had been moved into the placement ultimately determined to be correct.[29] The other two cases were continued for further hearings.

In a Connecticut tuition case, foster parents were named to enable a student to continue to receive residential tuition payments from a school district. Meanwhile, the child's parents moved to Vermont. This interesting case was continued after errors in the service of legal notices and the wording of the complaint were addressed.[30]

Faulty hearings involving due process claims after parents challenged an IEP led to claims by parents that school districts were responsible for tuition charges that accumulated as a result. The local school district refused to consider the student to be learning disabled even after the New York State Commissioner of Education ruled to that effect.[31] The school district maintained that state procedural due process should be expanded to allow school boards to contest further the commissioner's decisions. A federal district court held that the request was unnecessarily delaying the services needed and ordered the student to receive treatment within ten days. Similarly, a California district court accused a school district of engaging in delaying tactics by requesting additional tests of the student when the evaluations on file were "voluminous."[32] The court ordered the student admitted to a residential treatment center.

In a Pennsylvania case involving EHCA hearing delays, a state court refused to allow a school district to pay the tuition charge it desired to pay for a placement when the decision was subsequently overturned by the state secretary of education.[33] Even the secretary argued the tuition should be paid, since the state department had a custom of making such payments for thirty days after the secretary had overruled an examiner's decision. The court found that the custom was not recognized by law and that the parents must pay.

In a case since appealed to the United States Supreme Court, a divided panel of the Sixth Circuit Court of Appeals held that a district court failed to apply correct standards of review in approving the Cincinnati School District's decision not to mainstream a severely retarded boy.[34] The student's placement was challenged by his parents who argued

29. Doe v. Anrig, *supra* note 27.
30. Board of Educ. of Fairfield v. Connecticut State Dep't of Educ., 466 A.2d 343 (Conn. Super. Ct. 1983).
31. Blazejewski v. Board of Educ. of Allegany Cent. School Dist., 560 F. Supp. 701 (W.D.N.Y. 1983).
32. Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107 (N.D. Cal. 1982).
33. Wordsworth Academy v. Gaugler, 453 A.2d 1064 (Pa. Commw. Ct. 1982).
34. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

that the district's policy of assigning all trainable, mentally retarded students to county schools for the retarded violated provisions of EHCA. Distinguishing the case at hand from *Rowley*, the appeals court majority noted that the district policy violated the EHCA requirement of mainstreaming, which was not at issue in the Supreme Court case. In remanding the Cincinnati case, the appeals court asked the district court to conduct a de novo review, as required by *Rowley*, rather than the abuse-of-discretion standard it employed in affirming the district's policy. This is a case that will be further reported next year.

Other procedural issues concerning EHCA hearings were raised in 1983 cases. A Rhode Island district court held that parental consent was not required for a reevaluation of a student whose IEP was prepared three years earlier.[35] Such consent is necessary for an initial IEP. No rights were lost, the court reasoned, because the parents could administratively challenge any new IEP prepared as the result of the reevaluation. Likewise, a Missouri district court refused to interfere with the decision made by a three-person evaluation panel when the state-selected member was replaced in the middle of the hearing process.[36] The court reasoned that the parents' rights were not affected since it was the state's one representative on the three-person panel who was replaced.

A variety of state courts also considered issues surrounding placement hearings. A New Jersey court remanded a case to the state agency after determining that both the record and the arguments were inadequate and incomplete.[37] A Connecticut court concluded that a local board could not appeal a placement decision without including the student and parents as parties of record.[38] The Supreme Court of New Hampshire held that it could not accept cases directly from decisions made by the New Hampshire Board of Education.[39] It is necessary to initiate such proceedings in civil court. Similarly, appeal from a hearing officer's decision in Texas cannot be taken to court until the officer has acted on motions for a rehearing.[40] Finally, a New York case was dismissed as moot when the student had already repeated the grade in question.[41]

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35. Carroll v. Capalbo, 563 F. Supp. 1053 (D.R.I. 1983).
36. Cothern v. Mallory, 565 F. Supp. (W.D. Mo. 1983).
37. Drake v. Department of Human Servs., 453 A.2d 254 (N.J. Super. Ct. App. Div. 1982).
38. Board of Educ. of the City of New Britain v. Connecticut State Bd. of Educ., 461 A.2d 997 (Conn. Super. Ct. 1983).
39. *In re* Milan School Dist., 459 A.2d 270 (N.H. 1983).
40. Manor Indep. School Dist. v. Leachelle, 647 S.W.2d 770 (Tex. Civ. App. 1983).
41. Board of Educ. of Rocky Point v. Ambach, 457 N.Y.S.2d 946 (N.Y. App. Div. 1983).

Costly placements sometimes lead to lawsuits when school districts claim they lack the funds to pay for them. As a general rule, courts do not consider the ability to pay when ordering placements after EHCA procedures are followed. In New York, the commissioner of education sets maximum tuition rates that are charged by private schools receiving reimbursement from the state. Reductions in these rates led to a challenge filed by the parents of autistic children. In refusing to issue a preliminary injunction to stop the new tuition structure, the Second Circuit Court of Appeals noted that no schools had yet been closed and that the plaintiffs had failed in their responsibility to state a claim upon which relief could be granted.[42]

A Massachusetts school district claimed it could not pay the tuition of a special needs student because a statewide budgetary limit on school spending affected its ability to pay. A lower court found the argument irrelevant under Massachusetts law and this finding was sustained.[43] A claim that federal reimbursement funds had "dried up" was rejected by a New Jersey court as sufficient reason for failing to pay the tuition costs of a mentally retarded student as required by state statute.[44]

The dispute over the disposition of the profoundly retarded residents of the Pennhurst State School in Pennsylvania continued in 1983. The lengthy litigation again reached the Third Circuit Court of Appeals following a district court order that a child would receive more beneficial services in a community living arrangement.[45] The appeals court reversed.[46] While noting that only two school-age children remained at Pennhurst, the court concluded that parents had not been afforded sufficient consideration in the proceedings and remanded the case.

Kansas parents who sought to have their child mainstreamed failed to convince the Kansas Supreme Court that it should order such a placement.[47] The school district argued that the visually impaired child belonged in the Kansas State School for the Visually Handicapped. The Kansas high court decided not to allow "additional evidence" to be submitted at the appellate level and that there was "substantial evidence" as required under Kansas law for the initial decision made by the local court. A Pennsylvania court reached the opposite conclusion,

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42. Fallis v. Ambach, 710 F.2d 49 (2d Cir. 1983).

43. School Comm. of Brookline v. Bureau of Sp. Educ. Appeals, 452 N.E.2d 476 (Mass. 1983).

44. D.S. v. Board of Educ. of the Twp. of East Brunswick, 458 A.2d 129 (N.J. Super. Ct. App. Div. 1983).

45. Halderman v. Pennhurst State School, 553 F. Supp. 660 (E.D. Pa. 1982); *see* YEAR BOOK 1983 at 153.

46. Halderman v. Pennhurst State School, 707 F.2d 702 (3rd Cir. 1983, *rehrg. en banc denied*, 1983).

47. Bailey v. Unified School Dist. No. 345, 664 P.2d 1379 (Kan. 1983).

using that state's "substantial evidence" statute. The court ordered a Pennsylvania brain-damaged student sent to an institution outside the state, accepting the parents' arguments that there was no evidence that the state's alternative would be effective.[48]

Districts sometimes contest placement changes on the grounds that another district is liable. Two such cases were considered by the New Hampshire Supreme Court. In the first, the parents of a permanently institutionalized child moved and the new district argued that the cost of the placement still belonged to the former community. The court disagreed.[49] In the second, a couple sought to adopt a handicapped child, though the final adoption was not consummated. The New Hampshire court ruled that the district in which the child had lived for a year pending the unsuccessful adoption had the responsibility to pay for his residential placement.[50]

A mildly retarded, blind, twenty-year-old who had been institutionalized in Massachusetts since 1975 was transferred to a state hospital in 1981. The state department of education assigned the school committee in Amesbury, Massachusetts, the responsibility for paying for the special needs education for the person, arguing that Amesbury was the last known Massachusetts address of the student's parents. The Massachusetts appeals court upheld a lower court injunction that found the department's policy in assigning costs in the case to be without legal foundation.[51]

Parents of a mentally retarded Pennsylvania student received a list of possible private school placements for their child, but selected an alternative not on the list. The school district meanwhile took twenty-one months to develop an IEP for the student, a time interval that was unacceptable to the court. The district was ordered to pay for the placement, notwithstanding the fact that the program selected was outside the county.[52]

Finally, parents of a hearing-impaired Chicago student purchased a condominium in Skokie with the intention of enrolling their son in a Niles Township educational program. In determining that the family still resided in Chicago for educational purposes, the Illinois appeals court observed that the rest of the children in the family still went to school in Chicago and that home was the "true" family residence.[53]

4.1b Right to Education and Services

Right to education and related services cases involving handicapped

48. Murphy v. Pennsylvania Dep't of Educ., 460 A.2d 398 (Pa. Commw. Ct. 1983).
49. *In re* Bryan L., 462 A.2d 108 (N.H. 1983).
50. *In re* Gary B., 455 A.2d 929 (N.H. 1983).
51. Board of Educ. v. School Comm. of Amesbury, 452 N.E.2d 302 (Mass. App. 1983).
52. Pires v. Pennsylvania Dep't of Educ., 457 A.2d 79 (Pa. Commw. Ct. 1983).
53. Connelly v. Gibbs, 445 N.E.2d 477 (Ill. App. Ct. 1983).

students also expanded in number in 1983. Additional cases were filed testing the obligation of school districts to provide services to handicapped children beyond the 180-day standard school year. An important 1980 Third Circuit Court of Appeals case established the principle that individual handicapping conditions may require schooling in excess of 180 days.[54] Additional circuit courts of appeal gave the same reading to EHCA in 1983, even in the face of challenges to extended programs based on *Rowley*. Other cases in this area tested the definition of the "related services" required by EHCA; in two cases plaintiffs unsuccessfully sought to have school districts pay for psychiatric care.

Both parties appealed a 1981 Georgia district court case that led to an injunction against Georgia's 180-day rule.[55] The lower court had invalidated the rule but had refused to issue a mandatory injunction requiring the extended-year instruction without appeals from the plaintiffs concerning the individual IEPs of students. The Eleventh Circuit Court of Appeals agreed with the lower court ruling on both points, finding first that the state's policies impermissibly erected an absolute bar to any consideration of the child's needs beyond 180 days.[56] State claims that the students needed a summer off to "recharge their batteries" were overcome by evidence that the handicapped students sometimes lost the academic gains they had made during the school year if their programs were interrupted. *Rowley*, the appeals court observed, requires that EHCA procedures be followed and that programs "reasonably calculated" to enable children to receive educational benefits be developed. The state's rule violated both tenets. The appeals court also refused to overturn the district court's refusal to issue individual injunctions, calling this portion of the ruling a "creative remedy permitted by the statute."[57]

The Fifth Circuit reached a similar reading of EHCA requirements in striking down Mississippi's 180-day rule.[58] While a lower court had decided that questions concerning the duration of services had been left to the states in EHCA, the appeals court disagreed. Such an interpretation, the court concluded, "relies on a distinction neither intimated by the Act nor suggested by its legislative history."[59] Each child must have an IEP designed following EHCA procedures, as enumerated in *Rowley*, the appeals court noted. The lower court was instructed not to

54. Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

55. Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981); *see* YEARBOOK 1982 at 131-32.

56. Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983).

57. *Id.* at 1581.

58. Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

59. *Id.* at 1033.

evaluate the need for extended-year programs on behalf of any of the students until the state had the opportunity to provide new IEPs.

A Missouri district court found that state's policy limiting schooling to 180 days violated EHCA and section 504, using reasoning similar to the two cases just discussed.[60] While refusing to issue injunctions ordering additional services for the plaintiffs, the court did require the state to consider such need. Further litigation in these cases can be expected, especially if IEPs developed for the students do not include extended-year instruction.

A Michigan state appeals court concluded that a program for handicapped children in excess of 180 days did not violate the state's Headlee Amendment, which controls contributions that the state must make to local governments for "new" programs. The court concluded that the extended program ordered by a state hearing officer could not be characterized as "new" and therefore was not covered by the amendment.[61] In another summer recess case, a federal district court in North Carolina refused to order programs for children suffering from cerebral palsy because the plaintiffs had not exhausted their administrative appeal rights.[62] The plaintiff's section 504 and EHCA claims could be heard only in the context of such an appeal.

Appeals regarding "related services" continued in 1983. Such services are required under EHCA if they are necessary to permit the public education of handicapped children. What services are required, however, is often the subject of dispute. The well-publicized case involving the catheterization of a Texas student suffering from spinal bifida reached the Fifth Circuit Court of Appeals for the second time.[63] The Irving, Texas, school system continued to argue that the procedure was "medical" in nature and therefore outside the responsibility of the schools. As in its 1980 decision,[64] the appeals court rejected this argument. This time, however, the court expressed reservations about its earlier decision, but found that there were no grounds for reversing it. In support of its decision, quoting *Rowley*, the appeals court observed that the district must provide the services to "comport with the child's IEP." Since the IEP put the student in the regular classroom, the catheterization was not unreasonable. Because the actions of the defendants denied the student her rights under section 504, the court affirmed the award of attorney's fees under section 505.

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60. Yaris v. Special School Dist. of St. Louis Cty., 558 F. Supp. 545 (E.D. Mo. 1983).

61. Birmingham and Tanphere School Dists. v. Michigan Superintendent of Pub. Instr., 328 N.W.2d 59 (Mich. Ct. App. 1983).

62. Phipps v. New Hanover Cty. Bd. of Educ., 551 F. Supp. 732 (E.D.N.C. 1982).

63. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983); *see* YEARBOOK 1982 at 132-33 and YEARBOOK 1983 at 157-58.

64. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1983); *see* THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1981] at 143.

Two cases looked at whether psychiatric services should be considered "related services" under EHCA; each concluded that such services were not "educational." Parents of a District of Columbia student claimed that the cost of a psychiatric hospital, approximately $85,000 per year, was a related service covered by EHCA, because it permitted their child to learn, while the school district argued the contrary and offered a private program that focused on special education services, costing approximately $13,000 per year. The only issue faced by the district court, then, was whether the district was responsible for the cost of the psychiatric care. After a long review of "related services" cases, the court concluded that the district was not.[65] The court agreed with the defendants that psychiatric care was a "medical service" and that such services were to be provided under EHCA only for diagnostic and evaluation purposes. The hospitalization, then, was not an educational service and the parents were obligated for the costs. An Illinois district court reached an identical conclusion in a different case with the same facts, holding that EHCA did not require state funding of a child's treatment in a psychiatric hospital in that state.[66]

An Oregon appeals court considered the question of whether speech therapy for a four-year-old was a service that must be provided by the Salem School District.[67] The district declined to provide the service on the grounds that Oregon law did not require districts to educate handicapped children unless educational services were provided to nonhandicapped children in the same age group and that EHCA did not require the provision of services for children aged three to five.[68] After examining the Oregon statutes and EHCA in some detail, the court ruled that the Superintendent of Public Instruction acted properly in concluding that the district was not required to serve children in the plaintiff's age group, but would be obligated to provide services to such children if fifty percent or more of the age group did receive educational benefits. Because this was not the case in Salem, the services were properly denied.

Two lengthy opinions addressed the rights of persons institutionalized in facilities for the mentally handicapped in North Dakota. In a sweeping decision addressing numerous constitutional challenges, a district court ruled that the rights of inmates had been abridged in a variety of ways.[69] Of interest to the readers of this section, the court concluded

65. McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983).
66. Darlene L. v. Illinois Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983).
67. Stewart v. Salem School Dist. 24J, 670 P.2d 1048 (Or. Ct. App. 1983).
68. 20 U.S.C. § 1412; 34 C.F.R. 300.300(b)(3).
69. Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982).

that EHCA required a free appropriate education to mentally retarded citizens aged six to twenty-one and that these services had been denied the North Dakota inmates. Among a long list of changes ordered, the state was told to provide educational services. As in other cases of this type reported in recent years, a court monitor was appointed to follow the implementation of the order. Attorney's fees of over $500,000 were also awarded.[70]

The lower court's decision was upheld by the Eighth Circuit Court of Appeals.[71] At the basis of the state's appeal were arguments that the lower court had abused its discretion. In addition, the plaintiffs argued the lower court had improperly concluded that section 504 provided a basis for relief and that attorney's fees should not include prejudgment interest under section 1988. The appeals court rejected all these claims, though the fees were reduced slightly because the court decided the trial phase of the work could have been prepared in less time. The interest charges were allowed.

The EHCA requirement that state administrative appeals be concluded within thirty days led to a challenge by Illinois plaintiffs that delays in the process violated their right to a free appropriate public education. State defendants filed a motion seeking dismissal of the case.[72] The initial placement appeal, filed by the school district, was submitted in December, 1980, and was undecided as of May 1, 1981, when legal action commenced. The district court accepted the case as one that was "capable of repetition yet evading review," though the placement of the original plaintiff was settled. In looking at EHCA, the court concluded that the statute creates a private right of action to enforce its guarantees of a free appropriate education, citing a United States Supreme Court case covering right of action.[73] Because the state had not shown that the thirty-day rule was an excessive burden, the court rejected the state's motion to dismiss.

Delay in placement was also at issue in a continuing New York case.[74] The initial class action lawsuit led to an admission by the defendants that New York City had violated the rights of handicapped children by not evaluating and placing them in a timely manner. A court master was ultimately appointed to monitor the situation and both parties agreed that progress had been made. Still unresolved was the question of whether EHCA created a private right of action to

70. *Id.* at 495.
71. Association for Retarded Citizens of North Dakota v. Olson, 713 F.2d 1384 (8th Cir. 1983).
72. John A. v. Gill, 565 F. Supp. 372 (N.D. Ill. 1983).
73. Cort v. Ash, 422 U.S. 66 (1978).
74. Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983); *see* YEARBOOK 1983 at 161.

enforce injunctive relief for a whole class, or whether judicial review was possible only in individual cases. The defendants also sought to be free of the court's jurisdiction in the lingering case. After reviewing the progress to date, the court kept the case open and asked a newly appointed master to consider if additional sanctions against the district were appropriate. The court also affirmed that EHCA created a private right of action for classes.

The question of whether the state or local school districts should pay for residential placements was at the heart of an Oregon case.[75] There was no disagreement concerning the appropriateness of the placements, only whether the district in which the facility was located, the student's home district, or the state would pay. The federal district court concluded that the children were not "dependent" under ORS section 339.185(1), and therefore it was not proper that the home districts be billed. The state, the court found, had the obligation to provide supplemental funds to make the EHCA placements possible. The court gave the state ninety days in which to develop a plan to provide the funds.

Finally, the Pennsylvania Supreme Court upheld the powers of the state secretary of education to guarantee the rights of children under EHCA by certifying which private schools were eligible to receive payments for educational services provided to handicapped children.[76] The court concluded that state statutes gave the secretary ample authority to establish regulations for such schools and had justification for questioning the programs and staff qualifications at the school in question. The court also decided that the secretary did not have an obligation to review all the findings of fact presented by a hearing officer.

4.1c Discipline

As a general rule, expulsions of handicapped children are considered a "change in placement" under the terms of EHCA and procedures governing such changes must be followed. The Nebraska Supreme Court upheld a hearing examiner's decision requiring a residential placement for a severely handicapped child who was not permitted to return to his school unless his behavior changed.[77] In finding this to be the equivalent of an expulsion, the officer also extended the education due the child past his twenty-first birthday. The court held that this extension was an abuse of the examiner's discretion.

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75. Kerr Center Parents Ass'n v. Charles, 572 F. Supp. 448 (D. Or. 1983).
76. Wiley House v. Scanlon, 465 A.2d 995 (Pa. 1983).
77. Adams Cent. School Dist. v. Deist, 334 N.W.2d 775 (Neb. 1983).

4.1d Attorney Fees and Damages

A large number of cases claiming attorney fees or damages in suits involving handicapped children reached circuit courts of appeal in 1983. Some trends among the holdings in these cases are now becoming evident. It is generally agreed that EHCA does not provide grounds for either fees or damages. Parallel claims filed under sections 504 and 505 of the Rehabilitation Act of 1973 are meeting with increasing lack of success, with many jurisdictions ruling that suits that prevail under the terms of EHCA cannot then use section 504 violations that were secondary to the EHCA grounds in the original suit to claim fees. Claims raising Civil Rights Attorney's Fees Award Act sections 1983 and 1988 issues were also less successful last year, with courts increasingly holding that because Congress did not include fees and damages within EHCA, parallel section 1983 claims could not be accepted.

A 1981 Seventh Circuit Court of Appeals case is frequently employed as justification by courts that do award damages in EHCA cases.[78] The case established the principle that relief under EHCA was limited to an injunction regarding the child's program or placement. Two "exceptional circumstances" might permit an additional award—when the child's health was endangered by the actions of the state or when the state acted in extreme bad faith by ignoring EHCA provisions. In cases awarding damages in 1983, school districts fell into one or the other of these categories.

Four circuit court of appeals cases addressed the question of fee recovery principally under section 504. This issue was clearly confronted in a First Circuit Court of Appeals case that examined a district court award of $32,109 in attorney fees.[79] The appeals court first tackled the section 1988 claim, citing the "American Rule" that attorney fees are available only when statutory authority so provides.[80] EHCA clearly does not contain such authority. The court went on to conclude that even were the section 1983 claims "substantial," that would not provide support for the fees if the section 1983 claims were factually identical to the EHCA claims. As the appeals court summarized the issue, "Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorney fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award."[81]

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78. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); *see* YEARBOOK 1983 at 160-61.
79. Smith v. Cumberland School Comm., 703 F.2d 4 (1st Cir. 1983).
80. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).
81. Smith, *supra* note 79 at 8.

The appeals court made a similar finding with regard to the section 504 claims. The court held that EHCA was the comprehensive act specifying the rights of handicapped children. Even if section 504 provides for a private right of action, which the court found an undecided issue, there could be no "fee shifting" to section 504 to make the award possible.

An Eleventh Circuit Court of Appeals case concluded that no exceptional circumstances were present that would justify an award of damages to the parents of a child who was first diagnosed as learning disabled and then returned to a regular classroom.[82] The parents asked for special services to enable the child to "catch up" with his age group. In dismissing this request, the court found nothing in EHCA that required programming for a previously handicapped child. The appeals court also rejected the plaintiff's section 504 claim, noting that it was moot because the student had been removed from special education.

Two other circuit courts of appeals also held that EHCA provides the exclusive remedy in cases involving handicapped children and that the act precludes punitive damages. The Fifth Circuit Court of Appeals considered a request from plaintiffs for tuition and for punitive damages.[83] The tuition was refused because the parents had unilaterally moved their child to the private placement. The parents also claimed that they were entitled to damages because the school system should have recognized the fact that their son was emotionally disturbed and eligible for special services. The court held that Congress did not intend states to be subjected to punitive damages which would "divert even more funds from the primary goal of educating handicapped children."[84] Because there was no intentional discrimination, the court rejected the section 504 claim and further held that section 1983 could not be used as a vehicle to enforce EHCA violations.

The Seventh Circuit Court of Appeals considered a case in which additional compensatory education was sought by parents of a profoundly retarded, institutionalized, twenty-one-year-old.[85] The court concluded that the costs of compensatory education could not be recovered for the same reasons that damages could not be recovered. Citing their 1981 decision,[86] the court held that bad faith by the district might lead to an award, but that claims that the district in this case had engaged in bad faith were totally unfounded. The appeals court went on to join other circuits in concluding that EHCA, not section 504, was the exclusive remedy for procedural deficiencies in EHCA placements.

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82. Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983).
83. Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983).
84. *Id.* at 1356.
85. Timms v. Metropolitan School Dist. of Wabash Cty., 718 F.2d 212 (7th Cir. 1983).
86. Anderson, *supra* note 78.

A variety of federal district courts also addressed claims for damages in 1983. Courts in Illinois,[87] Florida,[88] Delaware,[89] and Connecticut[90] all concluded that section 504 did not provide a separate right to recovery of fees and damages when EHCA claims were advanced. Only the Illinois decision was reached sufficiently late to base its decision, in part, on the circuit courts of appeal decisions already discussed in this section. The other courts, as one judge put it, undertook the "foray into the morass" of previously conflicting opinions and reached decisions congruent with the appeals courts.

In a case decided without benefit of the Fifth Circuit Court of Appeals section 504 decision reported above, a Texas district court held that section 504 provided the authority for an award of over $24,000 in private school tuition costs to the parents of a handicapped child.[91] A school psychologist had recommended a private placement for the learning disabled child, but the system offered placement in a class for the mentally retarded. The child attended private school for four years before the parents again contacted the school system regarding an alternative placement. The court concluded that offering a placement in a class of mentally retarded students to a nonretarded student was a prima facie case of section 504 violation. Whether the school district's action was "exceptional," permitting the award, remains to be seen.

Parents of a learning-disabled Michigan child also brought suit under section 504 alleging an improper diagnosis and placement. The defending school system moved for a summary judgment stating, among other claims, that state statutes requiring the filing of suit within three years of an injury should apply since neither section 504 nor EHCA contains a limit on the time during which actions may be brought. After concluding that EHCA claims could not be brought under section 1983, the court held that section 504 potentially did provide such grounds.[92] The court also ruled that the issue of statutory limitations could not be decided because the facts in the case were disputed. The court therefore denied the request for summary judgment. Likewise, a Georgia court denied a motion for a summary judgment filed by school defendants in a case involving damages under section 504.[93] The court concluded that the defendants had ignored a state

87. William S. v. Gill, 572 F. Supp. 509 (N.D. Ill. 1983).
88. Manecke v. School Bd. of Pinellas Cty., 553 F. Supp. 787 (M.D. Fla. 1983).
89. Pollison v. Biggs, 567 F. Supp. 964 (D. Del. 1983).
90. Flavin v. Connecticut State Bd. of Educ., 553 F. Supp. 827 (D. Conn. 1983).
91. David H. v. Spring Branch Indep. School Dist., 569 F. Supp. 1324 (S.D. Tex. 1983).
92. Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (W.D. Mich. 1983).
93. Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983).

hearing officer's placement recommendation, but could not decide which federal statutes provided the basis for relief in the case.

The Eleventh Circuit Court of Appeals confronted the narrow issue of whether section 1983 could be used as grounds for the payment of attorney fees in an Indiana EHCA case.[94] The appeals court concluded that EHCA provided all the relief that was necessary to bring deficient procedures into conformity with the act. Therefore the court held that section 1983 was superfluous to the plaintiff's case and could not serve as the basis for fee recovery. An Indiana district court reached the same conclusion in a different case, holding that section 1983 did not supply the authority for a fee award.[95] The court stated that it "deplored" the lack of an exception to the rule, having concluded that the plaintiffs' damage claim was "meritless" and that they had litigated in bad faith.

Exceptional circumstances warranting the payment of fees and damages were found by a district court in Rhode Island.[96] A mentally and physically handicapped child was not provided with transportation to and from school for three years while his family struggled to transport him in a family vehicle. Because the mother was unable to maneuver the child's wheelchair, he was forced to wait in the van until his father's workday ended so that he could be lifted from the van into the house. The court found that the parents had repeatedly sought the required transportation service from the school system, to no avail. The court therefore held that EHCA provided the grounds for the recovery of transportation costs and that section 504 authorized payment of just under $20,000 in damages, plus reasonable attorney fees.

In a second case involving exceptional circumstances, the Second Circuit Court of Appeals considered a case in which the plaintiff was denied the opportunity for an EHCA hearing when a school district employee checked a box on a form indicating that the parent did not wish her child to be evaluated, having induced the parent to sign the form with the box unchecked. The Second Circuit majority concluded that this action entitled the parent to section 504 relief.[97] In a dissent to this conclusion, the minority opinion argued that the proper course for the plaintiff was an administrative appeal, rather than a trip to federal court for damages. The case was remanded to the district court for further consideration.

In an Illinois "bad faith" case, a district court weighed claims that a school district should pay damages for willfully violating EHCA rules

94. Doe v. Koger, 710 F.2d 1209 (11th Cir. 1983).
95. Benner v. Negley, 556 F. Supp. 749 (N.D. Ind. 1983).
96. Hurry v. Jones, 560 F. Supp. 500 (D.R.I. 1983).
97. Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2d Cir. 1983).

in preparing the student's IEP, including the charge that the parents were not given an opportunity to participate in the process.[98] The student was then given a diploma without, the parents argued, having received the services required by the IEP. While holding that the parents might be able to recover the tuition charge they incurred for following the IEP, the court dismissed a variety of other claims based on section 504, section 1983, and state law. The case was continued for further arguments on the bad faith claims.

Parents sought reimbursement for tuition charges in an Illinois appeals court case, claiming that their child's health was endangered by the school system's placement decision.[99] While a student's endangered health may be an "exceptional circumstance" requiring such a payment, the court found that the parents had not demonstrated that their child's health was jeopardized. Likewise, the school's early failure to comply with EHCA procedures was not a sufficiently serious error as to provide grounds for the claim.

Two fees and damages cases relied on interpretation of state statutes for their resolution. In the first, the Ninth Circuit Court of Appeals held that the thirty-day limit within which administrative appeals must be filed under the Hawaii Administrative Procedures Act applied to EHCA cases.[100] The case followed a Hawaii Supreme Court decision reported last year holding that the state was a "person" entitled to appeal an administrative decision under the Hawaii Act.[101] Finally, a Pennsylvania court held that there was no right to recover damages for an allegedly faulty placement of a handicapped child under the provisions of the Pennsylvania School Code.[102]

4.2 PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

4.2a Tuition and Assignment

A dispute over a student's entitlement to tuition-free admission to public schools in Texas was heard by the United States Supreme Court in 1983.[103] The Court, in *Martinez v. Bynum*, affirmed the decisions of the district court and the Fifth Circuit Court of Appeals, holding that

98. Max M. v. Thompson, 566 F. Supp. 1330 (N.D. Ill. 1983).
99. Teplitz v. Mount Prospect Elem. School Dist. No. 57, 453 N.E.2d 871 (Ill. App. Ct. 1983).
100. Hawaii Dep't of Educ. v. Carl D., 695 F.2d 1154 (9th Cir. 1983).
101. *In re* Eric G., 649 P.2d 1140 (Hawaii 1983); *see* YEARBOOK 1983 at 155.
102. Lindsay v. Thomas, 465 A.2d 122 (Pa. Commw. Ct. 1983).
103. Martinez v. Bynum, 103 S. Ct. 1838 (1983).

the residency requirement Texas imposed on would-be public school students was constitutional.[104] The residency requirement denied tuition-free admission to public schools to minors who lived apart from a "parent, guardian, or other person having lawful control" if the minor's presence in the school district is "for the primary purpose of attending the public free schools."[105]

The student involved, Roberto Morales, was a United States citizen who had resided with his parents in Mexico for several years. In 1977 Morales returned to Texas to live with his sister, who was not and did not wish to become Morales' guardian. Lower courts determined that Morales' presence in Texas was primarily motivated by a desire to attend the public schools.

The Court distinguished the Texas statute from previously invalidated durational residence requirements. Durational residence requirements have been struck down because they create "distinct and independent prerequisites" to state benefits.[106] Citing the need for local control over schools, the Court approved the Texas requirement because it furthered the "substantial state interest in assuring that services provided for its residents are enjoyed only by residents."[107] The policy was considered a bona fide requirement since it required only that a person establish residence to obtain services restricted to residents. The Court noted that residence requires both phyrical presence and an intention to remain and held that the Texas statute required only that those conditions be met before a student was admitted to the free, public schools.

A similar case was litigated in North Carolina.[108] North Carolina statutes allow admission to public schools only after a student has established domicile in the school district. The establishment of domicile requires that either the student's parents or guardian have made a permanent home in the school district. A student who lived with an aunt who was not the student's guardian sought admission to the public schools.

Citing the Surpeme Court's *Martinez* decision, the district court found the North Carolina requirement to be a "reasonable standard for determining the residential status of students in the public schools."[109] The district court also found its decision bolstered by the Supreme

104. Arredondo v. Brockette, 482 F. Supp. 212 (S.D. Tex. 1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981).
105. TEXAS EDUC. CODE § 21.031(d) (1982).
106. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).
107. Martinez, *supra* note 103 at 1842.
108. Harris v. Hall, 572 F. Supp. 1054 (E.D.N.C. 1983).
109. *Id.* at 1057.

Court's holding that "public education is not a right granted to individuals by the Constitution."[110]

Parents in Vermont appealed a decision of the state board of education[111] denying their request that the local school board pay tuition for their son to attend a private school other than the private school designated as the town's public school. The decision of the state supreme court revolved about several technical issues arising out of the ruling of a lower court. Holding that there was no constitutional right "to be reimbursed by a public school district to attend a school chosen by a parent,"[112] the Vermont Supreme Court dismissed the suit.

In a similar case an Arkansas appeals court held that students could not reside in one school district and attend school in a different district.[113] The court determined that residency was not established by the payment of tuition or by the appointment of "school guardianships."

A court in New York considered the case of a student who had been living with a family friend in New York since the death of his father.[114] The student's mother was a Jamaican citizen and the family friend was appointed as the student's guardian. The court decided that the guardianship constituted bona fide residence and allowed the student to continue attending the public schools.

An Illinois court considered a complicated suit that involved students seeking to attend schools outside their home districts.[115] The Niles school district was in the process of attaching a portion of the district to an adjacent school district. The new school district unilaterally accepted all students in the area and the Niles district sought an injunction to prevent this policy from taking effect. The Niles school district charged it would suffer from the loss of students prior to completion of the detachment proceedings. Parents of the students intervened in the suit against the Niles board, asserting that their children had a right to attend the schools of their choice. The court found that no enforceable right for nonresident students to attend out-of-district schools on a tuition-free basis existed.[116]

A student in South Carolina filed suit contesting the imposition of a tuition charge at a public school summer session.[117] Following similar decisions in such cases decided in other states, the state supreme court

110. Plyler v. Doe, 457 U.S. 202, 221 (1981).
111. Mason v. Thetford School Bd., 457 A.2d 647 (Vt. 1983).
112. *Id.* at 649.
113. Delta Sp. School Dist. v. McGehee Sp. School Dist., 659 S.W.2d 508 (Ark. 1983).
114. *In re* Moncrieffe, 467 N.Y.S.2d 812 (N.Y. Sup. Ct. 1983).
115. Board of Educ. of Niles Twp. v. Board of Educ. of Northfield Twp., 445 N.E.2d 464 (Ill. App. Ct. 1983).
116. *Id.* at 472.
117. Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983).

found that "the summer school was not a part of the free public school system;" therefore, the state was not required to make it available to children free of charge.[118] Additionally, the court held that attendance in a summer school was not a fundamental right.

The suspension of a student from school for failing to pay textbook fees was successfully challenged in Indiana.[119] The student alleged that the suspension amounted to a denial of equal protection. The court upheld the challenge on this ground and found that since suspension for failure to pay fees was not sanctioned by Indiana law, the student did not have to exhaust all administrative remedies.

Disputes over the placement of children in schools also resulted in litigation in 1983. Parents of a five-year-old child in Pennsylvania sued to force the school to enroll the child in kindergarten.[120] Analyzing state law, the court determined that a school district was required to provide free public education to resident children who were at least six years old.

A private school student in Michigan filed suit to gain admission to a public school band class.[121] The student alleged that the refusal of the school district to offer her "shared time" band instruction denied her equal protection of the law. The court rejected this claim, noting that under Michigan statutes the initial decision to offer shared time instruction was discretionary with the local school district. Only after shared time instruction was offered were constitutional structures of equal and nondiscriminatory treatment imposed.

The Nebraska Supreme Court pondered a family's freehold transfer petition.[122] A farmer with land in two school districts petitioned to have the land his residence stood upon transferred to the adjacent school district. The petition asserted that the transfer would be in the "best educative interest" of one of the children. The court found a significant amount of evidence confirming that the transfer would indeed be in the student's best interest and granted the transfer.

The same court reached a similar conclusion in another freehold transfer case.[123] The court announced that a freehold petition must be supported by an adequate showing that the transfer would be in the "best educative interest" of the student. Testimony by the parents and school officials that the transfer would be beneficial convinced the court to uphold the petition.

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118. *Id.* at 601.
119. Carder v. Michigan City School Corp., 552 F. Supp. 869 (N.D. Ind. 1982).
120. Goldsmith v. Lower Moreland School Dist., 461 A.2d 1341 (Pa. Commw. Ct. 1983).
121. Snyder v. Charlotte Pub. School Dist., 333 N.W.2d 542 (Mich. Ct. App. 1983).
122. *In re* Freeholder Petition, 330 N.W.2d 907 (Neb. 1983).
123. *Id.* at 481.

4.2b Transportation

Two Pennsylvania cases constituted the transportation cases for 1983. In the first, a legal challenge to one-way kindergarten busing returned to a district court following remand by the Third Circuit Court of Appeals. The district court had originally concluded that education was a fundamental right and that the busing plan created a "suspect classification" in violation of the fourteenth amendment because lower-income families could not afford the one-way charge, which was left to the families.[124] The appeals court rejected both parts of the district court's analysis and remanded the case for consideration of state statutory issues.[125]

In looking at the Pennsylvania Public School Code, the district court found language giving school districts the power to provide transportation "to and from kindergarten." The fact that the district was not required to provide the transportation, however, did not permit it to modify the code by providing only one-way busing. Thus the court concluded that the kindergarten busing must be both to and from school, if it is offered at all.[126] After issuing an injunction in the case, the court kept jurisdiction to ensure that its orders were followed.

In the second case, the parents of a Pennsylvania student enrolled their child in a neighboring public school district, agreeing to pay tuition for the privilege, but then sought to have their home district pay for their son's transportation. A court of first impression agreed with the parents, and the school district appealed. This first appeal was rejected on the grounds that Pennsylvania law required that free transportation be provided within a district or within a ten-mile radius of the district.[127] The appeals court also rejected the district's attempt to enter additional arguments in the case. Nine months later the case was heard by the Pennsylvania Supreme Court, which reversed the lower courts.[128] The Pennsylvania high court concluded that the ten-mile provision of the law in question applied to nonpublic school children, but that the transportation of public school children outside their district was not required.

4.2c Compulsory Attendance

Compulsory attendance cases have grown in number in recent years as parents seek to enroll their children in nontraditional religious

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124. Shaffer v. Board of School Dirs., 522 F. Supp. 1138 (W.D. Pa. 1981).
125. Shaffer v. Board of School Dirs., 687 F.2d 718 (3d Cir. 1982); *see* YEARBOOK 1983 at 167.
126. Shaffer v. Board of School Dirs., 570 F. Supp. 698 (W.D. Pa. 1983).
127. Babcock School Dist. v. Patocki, 455 A.2d 273 (Pa. Commw. Ct. 1983).
128. Babcock School Dist. v. Patocki, 455 A. 2d 616 (Pa. 1983).

schools or to educate them at home. Arguments sometimes ensure as parents claim these arrangements offer "equivalent instruction" to that obtained in the public schools, while local districts and state education departments argue the opposite. First amendment free exercise of religion claims sometimes are advanced, but courts have been reluctant to expand the holdings in *Yoder v. Wisconsin*,[129] which established narrow grounds under which compulsory attendance laws must give way to first amendment arguments.

Six state high courts heard challenges to compulsory attendance laws; four of the cases sustained the laws while two state supreme courts found their state's definitions of private school impermissibly vague. In North Dakota, parents challenged a requirement that teachers must be certified, arguing that the law negated their free exercise of religion because they believed the Bible required them to educate their children in certain Christian ways and that the state would be disrupting their religion if it required teacher certification.[130] Certification, they alleged, would substitute the word of the state for the rule of God. The North Dakota court disagreed, noting that "the freedom to hold religious beliefs is absolute . . . [but] the freedom to act, even if the action is in accord with religious conviction, is not totally free from legislative restrictions."[131] The court found that the defendants had not shown how the certification requirements interfered with their religious beliefs.

The Virginia Supreme Court held that children taught at home must be educated by tutors or teachers whose credenitals were approved.[132] The parents had alleged that the quality of instruction at their home was superior to that available in the public schools. The Virginia court also refused to consider the state's definition of a private school because the situation was governed by the state statute related to home instruction. In a similar case, the Supreme Court of Kansas upheld a decision that children were "in need of care" when their mother withdrew them from school to teach them at home.[133] Kansas law regulating private schools requires education by a "competent instructor," which the court found lacking in this case.

Likewise, the Nebraska Supreme Court rejected a defendant's plea for a continuance and affirmed a lower court order enjoining her from operating a school in her home.[134] The school in question served only

129. 406 U.S. 205 (1972).
130. North Dakota v. Rivinius, 328 N.W.2d 220 (N.D. 1982).
131. *Id.* at 223.
132. Grigg v. Virginia, 297 S.E.2d 799 (Va. 1982).
133. *In re* Sawyer, 672 P.2d 1093 (Kan. 1983).
134. State *ex rel.* Douglas v. Bigelow, 334 N.W.2d 444 (Neb. 1983).

the defendant's daughter. The court concluded that the state requirement that all teachers be certified did not conflict with the first or other amendments to the constitution.

In the first of two cases with different outcomes, the Wisconsin Supreme Court considered a case in which it was alleged that the state's definition of a private school was impermissibly vague. In previous years, state appeal courts had ruled that the statute was not overly broad,[135] but the case at hand represented the first time the Wisconsin high court had addressed the question. The case arose from the attempts of a mother to enroll her daughters at the Free Thinker School, which was affiliated with the Church of the Free Thinker. In looking at Wisconsin statutes, the court could find no definition of the term "private school" and no criteria under which local school administrators were to decide if a school in their area should be defined as such a school. The court therefore concluded that the definition was a legislative matter and reversed the conviction of the parents for violating the state's compulsory attendance law.[136]

In a case that made frequent reference to the case just discussed, the Supreme Court of Georgia also ruled that state statutes failed to define what constituted a private school.[137] Plaintiffs in the case had defined their home as a private school. While the state agreed that a formal definition was lacking in the statutes, they argued that a person of "ordinary intelligence" would know that such a school was one in which tuition was paid for education. In a 4-3 decision, the court disagreed with this argument, holding that the lack of a definition meant that prosecution could not be undertaken. As in Wisconsin, Georgia does not require private school instructors to be certified.

Two North Carolina cases addressed that state's compulsory attendance law. Parents who declared their home a private school for religious and "sociopsychological" reasons were denied an injunction by the Court of Appeals of North Carolina, which concluded that the parents had not raised significant first amendment issues.[138] Similarly, the Fourth District Court of Appeals held that parents who were members of a church that had no objection to public school education could not claim religious reasons for wishing to educate their children at home.[139] The appeals court decided that home instruction would not make the children "self-sufficient participants in our modern society."[140]

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135. *See* Wisconsin v. White, 325 N.W.2d 76 (Wis. Ct. App. 1982); *see* YEARBOOK 1983 at 171.
136. Wisconsin v. Popanz, 332 N.W.2d 750 (Wis. 1983).
137. Roemhild v. Georgia, 308 S.E.2d 154 (Ga. 1983).
138. Delconte v. North Carolina, 308 S.E.2d 898 (N.C. Ct. App. 1983).
139. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983).
140. *Id.* at 99.

A New Mexico appeals court considered arguments that the failure to permit home instruction violated the equal protection clauses of the state and federal constitutions. Employing the rational relationships test, the court concluded that compulsory education had sufficient justification, even though the state legislature had not compiled any legislative history when it enacted the New Mexico compulsory education law.[141]

A Louisiana appeals court ruled that school boards in that state had to initiate criminal proceedings or civil proceedings, followed by possible contempt charges, when parents failed to send their children to school.[142] A parish school board had sought a monetary judgment against parents for withdrawing their child from school.

Finally, in a different sort of case, a Pennsylvania court considered a suit filed by parents regarding family vacations.[143] The school district's policy permitted one educational trip of no longer than five days. The parents, however, took trips to the Caribbean, New England, Washington, D.C., and Europe, taking their children with them. As a result, they were fined a total of eight dollars, plus costs. Finding that neither logic nor law permitted the parents to flout the district's attendance policy, the court upheld the award.

4.3 BILINGUAL-BICULTURAL PROGRAMS

Chapter 1 of the Education Consolidation and Improvement Act of 1981, formerly Title I of the Elementary and Secondary Education Act, contains language requiring states to have parent advisory councils to advise them on the operation of migrant education programs funded under Chapter 1.[144] The Wisconsin Superintendent of Public Instruction established an Advisory Council on Migrant Education, but refused to create a parent advisory council on which a majority of the members were migratory parents or students, as was the case on the old Title I advisory council. In response to a suit seeking an injunction to require a council with controlling migrant representation, the Wisconsin superintendent claimed that private individuals could not file suit to enforce the provisions of Chapter 1 and that Congress did not intend to continue the parent advisory council when it recreated Title I as Chapter 1.[145]

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141. New Mexico v. Edgington, 663 P.2d 374 (N.M. Ct. App. 1983).
142. Livingston Parish School Bd. v. Lofton, 422 So. 2d 1357 (La. Ct. App. 1982).
143. Pennsylvania v. Hall, 455 A.2d 674 (Pa. Super. Ct. 1983).
144. 20 U.S.C. § 3801, § 2762(a)(4) (1981).
145. Valdez v. Grover, 563 F. Supp. 129 (E.D. Wis. 1983).

The district court quickly concluded that section 1983 permitted suits to address alleged violations of federal statutory law. The plaintiff had children who were among the intended beneficiaries of the migrant programs and the court concluded she had standing to sue. On the merits of her case, the court concluded that Congress had indeed removed the parent advisory council requirement for other Chapter 1 programs but had not clearly done so for the migrant education programs. Thus, in spite of the "administrative difficulties" that were present, the court issued a preliminary injunction requiring the creation of a council with controlling migrant community representation.

4.4 PRIVATE AND PAROCHIAL SCHOOLS

State involvement with private and parochial schools was at the center of several court cases in 1983. The issues of shared instructional materials, private school autonomy over its own discipline procedures, and bus transportation of nonpublic school children were litigated.

A struggle was waged in the First Circuit Court of Appeals over busing for private school pupils.[146] A Rhode Island statute divided the state into five regions. Busing was provided for nonpublic school students who attended a school within the confines of the region, even if the school was located outside the student's local school district. Public school students could be bused to a school outside their district only under special circumstances. Most of the private schools benefitting from the law were religious in nature. Hence, it was charged that the law was an illegal governmental support of religion.

The familiar three-part test of *Lemon v. Kurtzman* was applied by the court.[147] The test dictates that a statute must have a secular legislative purpose; second, its principal effect must neither advance nor inhibit religion; and third, the law must not provoke an excessive government entanglement with religion or excessive political divisiveness along religious lines. The court decided that the busing statute did have a secular motivation in that it sought to "protect the health, safety and welfare of pupils who live at such distances from the schools they attend as to make it impractical or hazardous to require the pupil to walk to school."[148]

The second prong of the test created more trouble. To pass the test, the busing mandated by the law would have to be "supplied in common

146. Members of Jamestown School Comms. v. Schmidt, 699 F.2d 1 (1st Cir. 1983).
147. 403 U.S. 602 (1971).
148. Schmidt, *supra* note 146, at 6.

to all students."[149] The district court invalidated this busing plan, in part, because interdistrict transportation was not equally provided to public school students.[150] The United States Supreme Court had allowed several similar cases that conferred extra benefits on parochial school students to stand.[151] The degree of tolerable disparity is, however, limited. The court held that public and parochial students had to be eligible for busing on the same terms: "[I]f distance is the criterion and sectarian students living a certain distance from their school are eligible for busing at public expense, public students living the same distance from their school must likewise be eligible."[152] Nonetheless, after appearing to support the plaintiffs, the appeals court upheld the statute, declaring that the Rhode Island law did not have a primary effect that advanced religion. The court also found that the busing policy did not entail an excessive or impermissible entanglement between government and religion. However, concern was expressed over the religious and political divisiveness that the busing controversy engendered.

West Virginia's highest court considered a similar case.[153] Parents petitioned the court to require school bus transportation for their children to and from their parochial schools. The county provided other forms of transportation for nonpublic school students. The court held that the provision of bus transportation for parochial school students did not violate the first amendment. However, the court overruled the precedent of a prior case and announced that "the equal protection clause is not violated by failure of a state to aid and support parochial or private schools."[154] The court decided that the mandate of West Virginia law that required "adequate means of transportation, for all children of school age" did not require identical modes of transportation for all students.[155]

A Wisconsin court also addressed the issue of "reasonable uniformity" in the provision of transportation to public and private schools.[156] The Janesville school board appealed a decision dictating

149. Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

150. Members of Jamestown School Comms. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981).

151. Springfield School Dist. v. Pennsylvania Dep't of Educ., 397 A.2d 1154 (Pa. 1979), *cert. denied*, Schooi Dist. of Pittsburgh v. Pennsylvania Dep't of Educ., 443 U.S. 901 (1979); Pequea Valley School Dist. v. Pennsylvania Dep't of Educ., 397 A.2d 1154 (Pa. 1979), *cert. denied*, 443 U.S. 901 (1979).

152. Schmidt, *supra* note 146 at 9.

153. Janasiewicz v. Board of Educ. of Cty. of Kanawha, 299 S.E.2d 34 (W. Va. 1983).

154. *Id.* at 36; the court reconsidered State *ex rel.* Hughes v. Board of Educ., 174 S.E.2d 711 (W. Va. 1970).

155. W. VA. CODE § 18-5-13 (6)(a) (1982).

156. Saint John Vianney School v. Board of Educ. of School Dist. of Janesville, 336 N.W.2d 387 (Wis. Ct. App. 1983).

that similar transportation must be provided under similar circumstances for both public and private school pupils. Wisconsin statutes require that transportation be provided to all students with "reasonable uniformity."[157] The school board provided school bus transportation for public school students who lived two or more miles from school. Students attending private schools two miles away were provided transportation through free use of the city bus system and parent/guardian contracts. The court rejected the claim that students using the city bus system were exposed to more risks than students who rode school buses. The court held that "reasonable uniformity" applied only to the distance criteria, not the mode of transportation.

In a final busing case, a New York court upheld a school district's right to deny free transportation to private school students who applied for transportation after a prescribed deadline. The court held that the students had not provided a reasonable explanation for the delay.[158]

The Kentucky Supreme Court considered the constitutionality of the state's textbook-sharing arrangement with private schools.[159] The policy allowed the state to supply textbooks to private schools upon request of the private school. The court found that the scheme offended the establishment clause. Because the state aid flowed directly to parochial schools, the program illegally supported religion. The court held that Supreme Court precedents applied only where aid flowed directly to a private or parochial school student.[160]

In Georgia, a parochial school student challenged his expulsion from the school.[161] The student and several of his classmates had a "beach party" in lieu of participation in the senior class trip. They left a rented apartment "damaged, dirty, and strewn with beer cans and whiskey bottles, pornographic magazines, vomit, and other litter."[162] The students were expelled for their conduct because drinking alcoholic beverages and immoral conduct were both dismissal offenses under the school's rules. The court rejected the claim that the expulsion had been unfair, noting the opportunities given to the student to refute the charges against him.

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157. WIS. STAT. ANN. § 121.54(1) (1982).
158. Board of Educ., Hauppauge Union Free School Dist. v. Ambach, 462 N.Y.S.2d 294 (N.Y. App. Div. 1983).
159. Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).
160. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).
161. Spell v. Bible Baptist Church, Inc., 303 S.E.2d 156 (Ga. Ct. App. 1983).
162. *Id.* at 157.

4.5 SCHOOL SPORTS

4.5a State Athletic and Activity Associations

Courts continued to support rules promulgated by state athletic associations in 1983. Students who challenged transfer rules, roster limits, and the actions of coaches remained unsuccessful in convincing courts that there is a constitutional right to participate in interscholastic athletics.

The Fifth Circuit Court of Appeals, for example, ruled that a student had no property interest in playing for the school football team.[163] The student's mother moved from Springbranch, Texas, to California in the fall of 1981. The student stayed behind and played varsity football. He rejoined his mother in California in December of tnat same year. He returned to Springbranch in August 1982 and again played football. In November, 1982, the University Interscholastic League declared the student to be ineligible to participate in interscholastic athletics, noting that students must maintain residency in a school district for one year prior to participation in interscholastic athletics.

Determining that the league's rules promoted the legitimate state interest of equalizing competition among participating schools, the court upheld the league's residency requirement. The student had claimed that the rule unconstitutionally restricted his right to travel and impinged upon his right to family privacy. The district court had dismissed the suit in an unpublished opinion, finding that it lacked subject matter jurisdiction. Drawing heavily from a prior Fifth Circuit case, the court also determined that the student's protected rights had not been abridged.[164] In the earlier case the Fifth Circuit Court of Appeals had upheld a similar residency requirement in Louisiana.

In another 1983 case, a Pennsylvania court upheld a similar transfer rule.[165] The Pennsylvania athletic association's rule disallowed school transfer when those transfers were athletically motivated. A student, declared ineligible by the association under the rule, claimed his due process rights had been violated by the decision. The court ruled that before a person is entitled to procedural due process an identifiable property right must be demonstrated.[166] Athletic competition was not such a right. In spite of the holding in this case, courts have generally

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163. Niles v. University Interscholastic League, 715 F.2d 1027 (5th Cir. 1983).
164. *Id.* at 1030; Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981).
165. Pennsylvania Interscholastic Athletic Ass'n v. Greater Johnstown School Dist., 463 A.2d 1198 (Pa. Commw. Ct. 1983).
166. *Id.* at 1201; *see also* Bunting v. City of Columbia, 639 F.2d 1090, 1093 (4th Cir. 1981).

required due process in residency cases because the actions of athletic associations constitute state action.

The Florida Supreme Court considered a challenge to a state activities association rule limiting the number of players who could be used by high school football teams during play-off competition.[167] The association limited each team's roster to forty-four players for play-off games. A student who did not make the cut challenged the rule, asserting that the rule denied him equal protection under the law. A lower court had agreed and invalidated the rule.[168]

The Florida high court held that, "as there is no constitutional right to play football or to participate in post-season football play-offs," the association needed only to demonstrate that the roster limit was rationally related to a legitimate state purpose.[169] The association argued that the rule reduced the costs of play-off contests, promoted fair play, and prevented violence during the games. Finding no compelling evidence to discredit the rule, the court upheld the roster limit.

Courts generally follow a "rational basis" standard in considering the rules imposed by coaches on their teams. An Illinois elementary school basketball coach required players to attend practice except in case of illness or death in the player's family. Those who missed practice were not allowed to dress for the next scheduled game. A player whose weekly catechism class conflicted with the team practice alleged that the rule abridged his right to freedom of religion.[170] Additionally, the student charged that the rule was arbitrary and did not bear a rational relationship to a legitimate school objective. The court dismissed the allegation of arbitrariness:

> The primary importance of the rule to the school program is that the rule promotes attendance at practice and as a result instills in young athletic participants a sense of teamwork and an appreciation of the individual's responsibility to the group. Promoting these qualities in each individual should be part of every elementary school education.[171]

The charge that the player's freedom of religion was abridged was weighed against the school's legitimate concern with the development of a pupil's character. The court considered the sincerity of the student's religious claim and the degree to which the challenged

167. Florida High School Activities Ass'n v. Thomas, 434 So. 2d 306 (Fla. 1983).
168. Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245 (Fla. Dist. Ct. App. 1982); *see* YEARBOOK 1983 at 181.
169. *Id.* at 308.
170. Keller v. Gardner Commun. Consol. Grade School Dist., 552 F. Supp. 512 (N.D. Ill. 1982).
171. *Id.* at 515.

regulation interfered with a "vital religious practice."[172] The court concluded that the student's catechism classes were a matter of personal preference, not of religious necessity. The court reasoned that "it is not mandatory that a fifth grade child attend a formal catechism class."[173] Since the religious practice was discretionary, the practice attendance rule survived the free exercise challenge.

In an unusual case, a New York student claimed her civil rights were violated by her high school basketball coach's failure to write a letter of recommendation.[174] The student alleged that the coach's negligence cost her a basketball scholarship. The court held that the coach was not required to write a recommendation since the student had no identifiable right to a college scholarship.

4.5b Sex Discrimination

Cases concerning sex discrimination in school athletics have declined in numbers in recent years. Arguments continue to be raised, however, as to whether sex-segregated teams for girls and boys can be justified as enhancing athletic opportunities or whether these teams violate Title IX of 20 U.S.C. § 1681. These issues were raised in a 1983 Arizona case.

Male students challenged the Arizona Interscholastic Association's (AIA) prohibition of boys playing on girls' athletic teams.[175] The AIA allows girls to play on boy's teams in noncontact sports, but boys are not allowed to play on girls' teams. Several boys filed suit seeking positions on the girls' volleyball team because there was not a boys' team. At the outset, the Ninth Circuit Court of Appeals announced that the prohibition could be sustained only if it was substantially related to the achievement of an important governmental objective. In applying this standard, the court said it was willing to consider actual differences between the sexes.[176] However, justifications that reflected "archaic and overbroad" generalizations were not acceptable.[177]

The AIA characterized the exclusion of males from female teams as a means to promote equality of athletic opportunity between the sexes. The AIA, through the rule, argued that it was seeking to "compensate for the girls' historical lack of opportunity in interscholastic athletics."[178] Allowing boys to participate on girls' teams would

172. *Id.* at 514; *see* Sherbert v. Verner, 374 U.S. 398 (1963).
173. Keller, *supra* note 170 at 514.
174. Hunt v. Scotia-Glenville Cent. School Dist., 460 N.Y.S.2d (N.Y. App. Div. 1983).
175. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982).
176. *Id.* at 1129; *see* Michael M. v. County Super. Ct., 450 U.S. 464, 468 (1981).
177. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982).
178. Clark, *supra* note 175 at 1127.

diminish athletic opportunities for girls because, the AIA alleged, boys were physiologically superior. The court ruled that the promotion of equal opportunity in athletics for women was a legitimate state objective, agreeing that males would probably displace females if they were allowed to play volleyball. Hence, the prohibition was upheld as a legitimate method of enhancing equal athletic opportunity for women.

An eighth-grade female in Missouri sought a court injunction that would allow her to compete for a place on her school's eighth-grade football team.[179] The student alleged that not being allowed to play football was a sex-based determination that violated her right to equal protection of the laws under the fourteenth amendment. The school provided no football team for girls and no volleyball team for boys.

The school district, in support of the policy, cited the risk to females who played contact sports with boys, administrative difficulties, and possible diminished athletic opportunities for girls should boys be allowed to play volleyball. The court declared that it would consider differences between sexes so long as they were "free of fixed notions concerning the roles and abilities of males and females."[180] The court rejected the notion that equal opportunity mandated the exclusion of each sex from participation in the other's sport: "[I]f the idea is to maximize educational athletic opportunities for all students, regardless of gender, it makes no sense, absent some substantial reason, to deny all persons of one sex the opportunity to test their skills at a particular sport."[181] The court found that safety considerations did not provide a substantial reason to prohibit females from playing football. Although no legal entitlement to a position on the football team existed, the court ruled that the school district could not prevent students, male or female, from trying out for the team.

An unusual case concerning attorney fees was decided in Michigan.[182] A girl was cut from the coed high school golf team in 1979. She filed suit, alleging that she had been discriminated against on the basis of sex. She later amended her complaint, charging that many of the school's athletic programs discriminated against females. The amended suit sought no damages, only a declaratory judgment. The school, after finding sufficient student interest, then formed a girls' golf team. The plaintiff dropped her suit, later seeking attorney fees as the "prevailing party." The court held that the fees could not be awarded unless it was demonstrated that substantial results were

179. Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020 (W.D. Mo. 1983).
180. *Id.* at 1024.
181. *Id.* at 1028.
182. Other v. Ann Arbor School Bd., 699 F.2d 309 (6th Cir. 1983).

achieved by the lawsuit. Since there was neither a settlement nor a consent judgment, the plaintiff could not be considered the "prevailing party" and could not recover fees.

4.6 SUBSTANTIVE RIGHTS OF STUDENTS

4.6a Search and Seizure

School officials have traditionally been held to lesser standards in the conduct of searches and seizure. Law enforcement officials acting in an official capacity are required to demonstrate "probable cause" before obtaining a search warrant. Only a narrow range of searches can be conducted without a warrant. School officials who conduct searches, however, are held to the less demanding standard of "reasonable suspicion." This less rigorous test is used when the evidence obtained from searches in school is used only in school disciplinary action rather than in criminal prosecution.

In 1983, courts issued conflicting opinions on the degree of suspicion required in cases where schools use sniff dogs to search students and property. Currently, a difference between the Fifth Circuit and the Seventh Circuit remains unresolved. Lower federal courts have also written opinions at odds with the decisions of other courts.

The Fifth Circuit has held the use of "sniff dogs" to search out drugs on school grounds constitutional.[183] In a second opinion, however, the court mandated that some level of "individual suspicion" exist before allowing the dogs to sniff students.[184] This holding conflicted with an opinion of the Seventh Circuit which found that sniffs were not searches within the meaning of the fourth amendment.[185]

In December, 1982, the Fifth Circuit entered a clarification of its opinion.[186] The court stated that school officials were not required to establish a "reasonable certainty" that contraband was present before using the dogs. Instead, the court had remanded the case so that the reliability of the dogs could be evaluated. The court sought to ascertain whether, with a degree of "reasonable certainty," a dog's alert could be said to represent a "reasonable suspicion" that contraband was present. The Supreme Court declined to review the case[187] and the district court decision on dog reliability is still awaited.

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183. Horton v. Goose Creek Indep. School Dist., 667 F.2d 471 (5th Cir. 1982).

184. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982); *see* YEARBOOK 1983 at 183-85.

185. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022; *see* YEARBOOK 1983 at 184.

186. Horton v. Goose Creek Indep. School Dist., 693 F.2d 524 (5th Cir. 1982).

187. Goose Creek Indep. School Dist. v. Horton, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

A search conducted by a high school principal was upheld in Ohio.[188] School administrators had received reports of vandalism and drug use in a student area known as "the pit." Surveillance by school officials resulted in the observation of a group of students smoking a marijuana cigarette. The students were taken into the school where they were questioned and searched. One student, identified by the others as the "dealer," was requested to submit to a strip search. The student revealed the contents of his pockets, yielding no contraband. He refused, however, to allow a complete strip search. No further search was conducted and no contraband found. Based upon the testimony of the other students, the plaintiff was expelled from school and subsequently filed suit contesting the search and expulsion.

The court held that the search conducted was reasonable, especially in view of the fact that the student had consented. The opinion continued, finding that even had the student not consented the search would still have been considered valid. The court found that since the school officials had acted "with responsibility for the control and discipline of the students" and, in view of the information that had been acquired, the search did not violate the student's fourth amendment rights.[189]

The school district then filed an interesting counterclaim, seeking attorney fees. The court upheld the claim, finding that "this action was frivolous, unreasonable, and without foundation."[190] Such an award in this type of case is unprecedented. Courts have, however, awarded fees to plaintiffs in cases raising significant constitutional issues. The fee issue has been appealed to the Sixth Circuit.

A New Jersey court invalidated a pair of searches of students in 1983.[191] In the first, a case which President Reagan used in public statements to illustrate his opinion that courts too often sided with student rule breakers, a student was apprehended smoking cigarettes in a bathroom. Her purse was searched for cigarettes. The search yielded various drug paraphernalia and a small quantity of marijuana. The search was invalidated because there was no reasonable suspicion. The court aknowledged that a lesser standard than probable cause was to be applied to school officials:

> [I]f the action of the [school] authorities is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it

188. Tarter v. Raybuck, 556 F. Supp. 625 (E.D. Ohio 1983).
189. *Id.* at 629.
190. *Id.* at 630.
191. *In re* T.L.O., 463 A.2d 934 (N.J. 1983); State v. Engerud, 463 A.2d 934 (N.J. 1983).

> will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the fourth amendment rights of students.[192]

However, since the evidence obtained was to be used in a criminal prosecution, a higher standard of suspicion was needed. The court held that the school official did not have reasonable grounds to believe that the student was concealing evidence of criminal activity. Since the possession of cigarettes was not a violation of school policy, there was no justification for further search.

The companion case reached a similar conclusion.[193] School administrators received an anonymous tip that a student was distributing drugs to other students. Acting on the tip, school officials used a pass key to open the student's locker and conducted a search of the contents. Two packets of a white powder, later identified as speed, were discovered and seized. The student was charged with criminal possession.

Following roughly the same logic as in the first case, the court walked the tightrope between the responsibility of school officials to maintain a suitable educational atmosphere and the constitutional rights of students. Acknowledging that the student had an expectation of privacy in the locker, the court held that there was not sufficient evidence to suggest that the locker contained contraband. Had the school employed a policy of regular locker inspection, the student's expectation of privacy "would not have been as significant."

A case in California focused on the distinction between searches conducted by law enforcement officials and those performed by school personnel.[194] A police officer moonlighting as a security guard for a public school apprehended a juvenile who was trespassing. In accordance with standard police procedure, the guard conducted a pat-down search of the juvenile. The search yielded a mace, which had been concealed by the juvenile. The juvenile was made a ward of the court for having possession of the club. The youth contested the search and sought to have the evidence suppressed.

The state conceded that the search would have been illegal under normal circumstances. However, when examined under the less exacting standards applied to school personnel, the search and the evidence produced were valid. The court decided that although the guard was a police officer, that night neither was he equipped as a law enforcement officer nor was his intent to "enforce the law."[195] The court found that

192. *Id.* at 940.
193. *Id.* at 943; *see* People v. Overton, 360 N.E.2d 596 (N.Y. 1967).
194. *In re* Reynaldo R., 196 Cal. Rptr. 238 (Cal. Ct. App. 1983).
195. *Id.* at 239-40.

the search was "cursory" and "conducted as a routine part of the procedure in furtherance of a nonpenal purpose."[196] From this opinion, it can be suggested that part of the distinction between police and school searches rests upon the purpose of the search. If the search has a nonpenal purpose it can be validly conducted upon school grounds, even upon nonstudents. The evidence found during such searches is not considered tainted, however, and might be used in criminal proceedings. Courts, then, may have to consider carefully the motives of those conducting searches, a sometimes difficult question.

A teacher's aide patrolling a Florida school parking lot looked into a student's car and observed paraphernalia commonly involved in drug use. Further search revealed a quantity of marijuana cigarettes. A state court, reviewing the student's request to quash the evidence that was used in criminal prosecution, found that the student's expectation of privacy was lowered by other drug use at the school.[197] The doctrine of in loco parentis gave school officials more latitude in their actions. Additionally, the court held that school administrators have wider power in order to provide for a safe environment conducive to educational purposes:

> [T]he realities of the school setting require that teachers and other school personnel have the power to make an immediate, limited search, for contraband, weapons, or other prohibited objects or substances, when a reasonable subjective suspicion supported by objective articulable facts would lead a reasonably prudent person to suspect that these items are present, or that school regulations are being violated.[198]

The court justified the search by citing the responsibility of school personnel to patrol school property. The need to supervise students on school property essentially obviated the requirement that mere looking in cars be preceded by "reasonable suspicion," the court said. Thus, the aide's look into the car was a "legally permissible pre-intrusive open view." The discovery of the paraphernalia was sufficient to justify a more extensive search of the car.

A Kentucky court heard a student's suit for damages arising out of a strip search conducted in a high school.[199] The student was known to have distributed a variety of illegal drugs to his classmates. Additionally, the student admitted that he used marijuana frequently. He was then requested to submit to a search. At no time did the student resist. No contraband was discovered and no criminal charges were filed.

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196. *Id.* at 241.
197. Florida v. D.T.W., 425 So. 2d 1383 (Fla. Dist. Ct. App. 1983).
198. *Id.* at 1386; *see also* Washington v. McKinnon, 558 P.2d 781, 784 (Wash. 1977); *In re* L.L., 280 N.W.2d 343 (Wis. 1979).
199. Rone v. Daviess Cty. Bd. of Educ., 655 S.W.2d 31 (Ky. Ct. App. 1983).

The court announced that strip searches could not be justified as a normal procedure. Strip searches could be conducted only after school administrators had a "substantial reason" to believe that the student was in possession of contraband. However, the court affirmed the special powers school officials possess to "safeguard the welfare" of students in the school.[200] In this context the search was held to be reasonable under the proscriptions of the fourth amendment.

A Texas court reviewed an order finding a juvenile to be delinquent.[201] The juvenile, a student at a San Antonio public high school, was detained during his school's "test day." In accordance with school policy for that day, students were to be in a classroom taking a test or in the auditorium or, if exempt from testing, at home. The student was found roaming the halls and was sent to the principal's office. The principal testified that while in the office the student "paced about the office and was belligerent, and had red eyes and was very erractic."[202] the principal ordered the student to empty his pockets, threatening to call the police if the student failed to comply. The student produced a marijuana cigarette from his pocket.

Relying heavily on prior cases, the court ruled that the principal's actions were covered by the doctrine of in loco parentis.[203] The court quoted with approval a 1970 Texas case that stated, "it does not seem to be outside the purposes of discipline in a system of education for the principal of a public school to discover and bring under control drugs considered dangerous under law and possession of which is made an offense by law."[204]

2.6b First Amendment Religious Rights

A number of important first amendment religion cases were decided in 1983. Attempts by legislatures and school boards to provide for "moments of silence" or other forms of religious observances short of formal prayers continued to result in litigation. Courts consistently held these schemes unconstitutional because of their nonsecular purposes. For the most part, moments of silence are seen as a proscribed official establishment of religion. In addition, the use of public school property by religious groups, textbook-sharing agreements, public school Bible study classes, and tuition tax credits for education were reviewed by courts in 1983.

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200. *Id.* at 33-34.
201. R.C M. v. Texas, 660 S.W.2d 552 (Tex. Ct. App. 1983).
202. *Id.* at 553.
203. *See* Mercer v. Texas, 450 S.W.2d 715 (Tex. Civ. App. 1970); Ranniger v. Texas, 460 S.W.2d 181 (Tex. Civ. App. 1970).
204. Mercer v. Texas, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970).

In order to determine whether a public school policy or practice violates the provisions of the establishment clause, courts use the tripartite test delineated in *Lemon v. Kurtzman.*[205] Approval of the policy requires courts to consider three questions: Does the policy have a secular purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy engender an excessive entanglement with religion? Should the policy or practice fail to meet any of these criteria, it violates the first amendment.

The United States Supreme Court held in *Engle v. Vitale* that a school religious practice that is voluntary still violates the establishment clause.[206] This prohibition was cited, along with the *Lemon* test, in a 1983 Eleventh Circuit Court of Appeals decision that reversed a district court decision and struck down Alabama's moment of silence.[207] This case followed a labyrinthine path to adjudication. The district court had flouted the principle of stare decisis and many precedents on the question and upheld Alabama statutes that provided for a "period of silence" at the start of the school day and prescribed a prayer for those teachers who desired to lead their classes in devotions during that time.[208]

The plaintiffs had appealed to Justice Powell for a stay of the district court's decision. In granting the stay, Powell chastised the district court for its unique interpretation of the first amendment.[209] The case then came before the court of appeals where the statutes in question were struck down. At the outset, the court of appeals found that the absence of a requirement mandating that a prayer be recited in the schools did not exempt the practice from scrutiny under the *Lemon* test.[210] The fact that it was teachers who were leading the prayers provided the basis for classifying the practice under the mantle of state action. The court found no secular purpose in the practice, despite the voluntary nature of the statutes. The court held that "prayer is perhaps the quintessential religious practice."[211] Thus, it concluded that the existence of prayer precluded a secular purpose or an effect that did not advance religion. Finally, it was decided that because the prayers took place on public property and were led by government employees, the practice constituted an excessive entanglement with religion.

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205. 403 U.S. 602 (1971).
206. 370 U.S. 421 (1962).
207. Jaffree v. Wallace, 705 F.2d 1528 (11th Cir. 1983); *see* YEARBOOK 1983 at 188.
208. Jaffree v. Board of School Comm'rs of Mobile Cty., 554 F. Supp. 1104 (S.D. Ala. 1983).
209. Jaffree v. Board of School Comm'rs of Mobile Cty., 103 S. Ct. 842, 843 (1983).
210. Jaffree v. Wallace, *supra* note 207 at 1533.
211. *Id.* at 1534.

A similar policy was challenged in New Mexico.[212] The New Mexico legislature had authorized schools to provide for a "moment of contemplation" each day. In a fashion similar to the Alabama statute, the New Mexico law allowed prayer during this moment of silence.[213] The district court examined the legislative history of the act and determined that the purpose of the statute was "to establish a devotional exercise in the classrooms of New Mexico public schools."[214] Having determined the nonsecular purpose of the statute, the court considered whether the law advanced the cause of religion. It concluded that the public's perception of the practice caused an advancement of religion. The court also cited the hazards "inherent in the sovereign placing its imprimatur on a religious exercise . . . where children are involved."[215]

A district court in Houston struck down school prayer of a somewhat different form.[216] Over the entrance to the Aldine Senior High gymnasium appeared the following inscription: "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen." This prayer was also recited at school assemblies, athletic events, and other extracurricular proceedings. The court concluded that this activity constituted prayer that was organized and practiced in such a way to offend the United States Constitution.

Responding to the school district's claim that the prayer was a means to a secular goal, the court concluded, "A school district or other governmental body cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means."[217] The court then refuted the oft-repeated notion that the voluntary nature of the practice rendered it constitutionally inoffensive. Citing a line of cases, the court stated that "voluntariness is not relevant to a first amendment inquiry."[218] The court also found cause for invalidation of the practice in the third part of the *Lemon* test. Because the activity was undertaken on school grounds and at school events, it excessively entangled the school with religion.

In New Jersey, a United States district judge struck down New Jersey's "minute of silence" law.[219] The minute of silence each morning in the state's schools was to provide for contemplation or introspection

212. Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983).
213. N.M. STAT. ANN. § 22-5-4.1 (1982); ALA. CODE § 16-1-20.1, § 16-1-20.2 (1982).
214. Duffy, *supra* note 212 at 1015.
215. *Id.* at 1016.
216. Doe v. Aldine Indep. School Dist., 563 F. Supp. 883 (S.D. Tex. 1982).
217. *Id.* at 886.
218. *Id.* at 887.
219. May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983).

before the start of school. The court held that the statute was, in reality, a thinly veiled attempt to "sneak prayer into the public schools."[220] The court cited the legislative history of the proposal in finding that it had no secular purpose as required by the *Lemon* test.

The Court of Appeals of California voided plans for prayers at public school graduation ceremonies in Alameda County.[221] The court held that the prayers constituted illegal governmental establishment of religion. The court also dismissed the claim that the students had a constitutional right to hear a prayer, especially at an event which was noninstructional.

During 1983 courts also considered the relationship between church and state in cases involving the use of public school property by religious groups, textbook-sharing agreements, public school Bible classes, and tuition tax credits. In a case attracting wide notice, the United States Supreme Court upheld a Minnesota plan that gave tax credits to parents to defray the cost of their children's education.[222] The statute allowed state taxpayers to deduct expenses incurred in providing "tuition, textbooks, and transportation" for children attending elementary or secondary schools.[223] The Court first appeared to deemphasize the *Lemon* test by announcing that "While this principle [the *Lemon* test] is well settled, our cases have also emphasized that it provides no more than a helpful signpost in dealing with establishment clause challenges."[224] Nonetheless, the Court then proceeded to decide the case within the *Lemon* framework.

The tax credit program was judged to have a secular purpose: helping parents pay for their children's education at any institution. Though most of the benefits from the scheme would accrue to families with children enrolled in private schools, the court held that such an effect was incidental and not the primary goal of the statute: "Public assistance made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted might not offend the Establishment Clause."[225] Having made this claim the Court then proceeded to affirm the tax credits in the face of challenges stemming from the two remaining criteria of the *Lemon* test.

In Pennsylvania, a federal district court faced a claim that the Williamsport School District had discriminated against a group of

220. *Id.* at 1572.
221. Bennet v. Livermore, No. H-91312-6, Educ. Dailey, June 15, 1983 (Cal. Ct. App. 1983).
222. Mueller v. Allen, 103 S. Ct. 3062 (1983).
223. MINN. STAT. ANN. § 290.09(22) (1983).
224. Mueller, *supra* note 222 at 3066.
225. *Id.* at 3068.

students by not allowing them to form a club devoted to prayer and the study of the Bible.[226] The Williamsport High School organized a "student activity period" to encourage students to participate in extracurricular activities. Several student sought sanction for a group that would prayer and read the Bible at meetings. Their request was denied by school officials, who cited the establishment clause as justification. The students filed suit alleging that their right of free exercise of religion had been denied.

The court employed a two-tier test to determine whether the school district had indeed violated the students' rights. The first segment of the test required the students to demonstrate that the school district had either "conditioned receipt of an important benefit upon conduct proscribed by a religious faith or denied such a benefit because of conduct mandated by religious belief."[227] Once the coercive nature of the action had been established, the school district would be required to prove that the action stemmed from a compelling interest and that less restrictive measures were not available. Applying this test, the court found that the students' free exercise rights had not been unjustly affected. It was determined that the students had not suffered the loss of a benefit when their club was denied permission to meet on school grounds. The court ruled that the students were still able to pray and worship without restriction at other times and in other places.[228]

The court then explored the free speech issues raised by the plaintiffs, looking at the law surrounding speech in public forums.[229] The court decided that the school district had established a limited public forum by creating the activities period. The school district was thereby obligated to avoid restrictions on speech in that forum unless the restrictions were vital to ensure the functional integrity of the forum. Thus, "The scope of permissible limitations appears to be defined by the government's purpose in creating the forum."[230] The court decided that the school's actions constituted impermissible content-based restrictions, since no other group had ever been denied permission to meet during the activities period. The school's refusal to allow the group to meet was judged to have no relation to maintaining the integrity of the public forum.

Finally, the court considered the state's claim that allowing the Bible study group to meet on school grounds, under the supervision of school

226. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983).
227. *Id.* at 702.
228. *Id.* at 703.
229. *See* Widmar v. Vincent, 454 U.S. 270 (1981); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Rels. Comm'n, 429 U.S. 167 (1976).
230. Bender, *supra* note 226 at 705.

personnel, would violate the provisions of the establishment clause. This argument was dismissed by the court by utilizing the *Lemon* test. The court decided that the policy that gave the religious group the right to meet was secular in nature. Although the policy contributed to the advancement of religion, that result was merely incidental. Hence, the policy was able to pass constitutional muster.[231]

In a similar case, a federal district court in Kansas reviewed a claim filed by the Country Hills Christian Church.[232] The church contested the refusal of the Johnson County School District to rent it space in which to hold religious ceremonies. The school district had adopted policies that granted other nonschool groups access to school facilities. The court ruled that such an access policy created a public forum: "If it is opened to the school district community for meetings and discussions during non-school hours, then it becomes a public forum for the community."[233]

The court then considered whether a policy that allowed access to religious groups would violate the establishment clause. Following the structure of inquiry elaborated in *Lemon*, the court concluded that the policy was constitutional. It ruled that the primary effect of the policy was secular; hence, any advancement of religion resulting from the policy was incidental. Further, in determining whether the open access policy entangled the school district with religion, the court held that an open access policy in fact deterred excessive entanglement.[234]

Another public forum case was litigated before a state court of appeals in Florida.[235] The Sarasota County School District allowed two churches to hold services in school facilities. Suit was brought by a parents' group alleging that this action violated the establishment clause. As in the previous cases, the court found that religious assemblages could be tolerated in school facilities if the gathering was the result of an open access policy.

The relationship between religion and school curriculum also has been explored in several recent cases. The Sixth Circuit Court of Appeals upheld the district court's injunction against an arrangement between public and private schools involving "shared time" and "community education" programs in Grand Rapids, Michigan.[236] The programs

231. *Id.* at 710.
232. Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983).
233. *Id.* at 1216.
234. *Id.* at 1219.
235. O'Hara v. School Bd. of Sarasota Cty., 432 So. 2d 1356 (Fla. Dist. Ct. App. 1983).
236. Americans United for Separation of Church and State v. School, 546 F. Supp. 1971 (W.D. Mich. 1982); *see* YEARBOOK 1983 at 188.

offered classes in schoolrooms leased by the school district from nonpublic schools. Signs were posted in the leased rooms designating them "public school" rooms. Almost invariably the students attending classes in the leased rooms were from the adjoining nonpublic schools. The average nonpublic school student, however, spent less than ten percent of his or her time attending classes offered through the shared time program.

Applying the *Lemon* test, the appeals court determined that the purpose of the program was indeed secular. However, despite the secular purpose of the program, the beneficiaries were a narrow range of religiously segregated students. Since most of the attendees of the program were students of parochial schools and since many of the instructors in the program retained ties to those same parochial schools, the court found it impossible to assert that the program did not serve to advance religion. Examining the third portion of the *Lemon* test, the court found the program to cause excessive administrative entanglement between the school district and religion. The court was careful to distinguish its opinion in this case from the recent United States Supreme Court decision concerning state aid to nonpublic schools.[237] The distinction rested upon the fact that the grand Rapids program directly aided nonpublic schools whose primary purpose involved religious instruction.[238]

A South Dakota textbook loan statute was scrutinized by the Eighth Circuit Court of Appeals.[239] A suit was brought challenging the state's policy of providing textbooks for nonpublic as well as public school students.[240] Only books that were utilized by public schools could be made available to private school pupils. It was charged that the loan statute was unconstitutional, both facially and in its application. The suit alleged that the statute had the primary effect of advancing religion by providing public aid to church-related, private schools. In addition, it was charged that the loan policy engendered an excessive entanglement between church and state.

The court concluded that the textbook loan statute did not violate the proscriptions of the first amendment. Drawing heavily from decisions of the United States Supreme Court, the court decided that since the textbooks loaned to private schools were also designated for use in public schools the statute did not necessarily serve a religious purpose.[241]

237. *See* Mueller v. Allen, 103 S. Ct. 3062 (1983).
238. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).
239. Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848 (8th Cir. 1983).
240. S.D. CODIFIED LAWS ANN. § 13-34-162 (1982).
241. Elbe, *supra* note 239 at 851.

However, the appeals court remanded the case to the district court to ascertain whether the manner in which the loan statute was applied violated the Constitution. The court noted that the provision of ostensibly neutral instructional materials to predominantly religious schools might still offend the first amendment.

Parents of a high school student in Pennsylvania filed a civil rights action against a school guidance counselor.[242] The parents charged the counselor with violating their child's right to free exercise of religion and intruding upon the privacy of a family relationship. The counselor, in sessions with the student, had inquired about the student's family relationships, religious beliefs, and sexual orientation. The counselor, after several of these sessions, recommended that the student undergo psychiatric evaluation.

The court held that, "while there is a constitutional right to freedom of religion, it is not absolute and may be circumscribed by a compelling state interest."[243] In this case the court ruled that the first amendment does not guarantee that nothing about religion will be taught or discussed in a public school. Moreover, the discussion of sensitive topics, even between a teacher and a student, does not intrude upon constitutional rights of privacy or belief.

A federal district court in Virginia decided a cases challenging the constitutionality of a Bible class taught in public elementary schools.[244] A course in the study of the Bible was offered as an elective to fourth and fifth graders in the public schools. These classes were funded, staffed, and controlled by a volunteer group of Protestant ministers from the area. No control over the curriculum of the program was exercised by the school district.

The court held that the teaching of a Bible class was not unconstitutional per se: "The first amendment was never intended to insulate our public institutions from any mention of God, the Bible, or religion."[245] However, the court cited the religious affiliations of the sponsors of the program in finding the program unconstitutional. The pervasive influence of organized religion in the teaching of the course caused the course to become a forbidden, governmental-supported exercise of religion.[246] Several guidelines were set forth in the opinion to facilitate the teaching of the Bible in an objective, secular manner.[247] At the heart of these recommendations was the need for such a class to be

242. Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983).
243. *Id.* at 456.
244. Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983).
245. *Id.* at 1425.
246. *Id.* at 1430.
247. *Id.* at 1431; *see also* Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

under the supervision of school authorities. The court held that the curriculum should be controlled by public school officials and the instructors ought to be certified by the state.

The Eleventh Circuit Court of Appeals upheld a district court's award of attorney fees.[248] A suit in Alabama had successfully challenged a practice of conducting morning devotionals and a Bible class in a public high school.[249] The court held that even though the case had not "revolutionized First Amendment Law," there was still sufficient justification to award attorney fees to the prevailing party.

Finally, the Louisiana Supreme Court pondered a question certified to it by the Fifth Circuit Court of Appeals.[250] The court of appeals asked the State Supreme Court to determine whether the Board of Elementary and Secondary Education, established by Louisiana's Balanced Treatment for Creation-Science and Evolution Science Act, ensured the educational policy prerogatives of the state legislature.[251] The court held that the board's existence did not foreclose the exercise of control over the state education system by the legislature, but did not consider other aspects of the act.

4.6c First Amendment Freedom of Expression

The first amendment rights of students were explored in a variety of manners by courts in 1983. Suits contesting textbook selection statutes, the placement of undercover agents in classrooms, and the firing of a high school journalism teacher, allegedly involving his supervision of the school newspaper, all raised important constitutional questions.

Parents, teachers, and students brought action challenging the constitutionality of Oregon's textbook selection statute. The statute provides that "[n]o textbook shall be used in the schools which speaks slightingly of the founders of the republic or of those who preserved the union or which belittles or undervalues their work."[252] The students claimed that the statute restricted their first amendment right of free access to information.

The students' claim was held to be nonjustifiable by the federal district court because the students lacked standing to sue. On appeal, the Ninth Circuit Court of Appeals decided that the students did possess standing since their alleged injury "can be traced to the

248. Hall v. Board of School Comm'rs of Conecuh Cty., 707 F.2d 464 (11th Cir. 1983); *see* YEARBOOK 1982 at 155-56.
249. Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981).
250. Aguillard v. Treen, 440 So. 2d 704 (La. 1983).
251. LA. REV. STAT. ANN. §§ 17.286.1-17.286.7 (1982).
252. OR. REV. STAT. § 337.260 (1982).

challenged action."[253] In this case, the restraint of the students' rights was held to stem from the textbook statute. The court of appeals remanded the case to the district court for a decision on the merits.

An undercover policewoman was placed in two high school classes in Warren, Michigan. The officer was to assist in reducing drug trafficking in the high school. The policewoman was placed in classes known to be run "liberally" on the open classroom model. Teachers and students filed a suit alleging that the presence of the agent inhibited free discussion in the two classes.[254] Once it was known that police operations were being conducted in the school, it was claimed "class discussions became stilled, and certain topics were avoided, and students refused to freely express their opinions."[255]

The court responded to the students' claim that their first amendment rights were chilled by the presence of the agent by holding that the "mere presence of an intelligence data-gathering activity in the classroom does not create a justifiable controversy."[256] Hence, a first amendment claim could not be established.

In California, a high school journalism teacher was dismissed from employment. He alleged that his firing resulted from a series of disputes over the content of the student newspaper in the school. He also claimed that school officials had violated his constitutional rights and also those protecting the integrity of the student newspaper.[257] After a series of controversial articles, the principal of the school insisted that issues of the paper be submitted to his office to ensure accuracy and fairness. The principal often voiced disapproval but never denied publication or censored the submitted articles. The court held that though students maintain their constitutional rights in school, those rights are "not coextensive with those of adults and may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment."[258]

School officials are thus entitled to prepublication review of student newspapers as long as the review furthers a "substantial educational interest." The court announced that the judiciary could intervene only where the resolution of conflicts in school administration clearly involved constitutional values.[259] It is important to note that the paper in question was fully supported by the school.

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253. Johnson v. Stuart, 702 F.2d 1983 (9th Cir. 1983).
254. Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983).
255. *Id.* at 779.
256. *Id.* at 781.
257. Nicholson v. Board of Educ. of Torrance Unified School Dist., 682 F.2d 858 (9th Cir. 1982).
258. *Id.* at 863; *see* Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980).
259. *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

4.7 SANCTIONS FOR STUDENT MISCONDUCT

4.7a Suspensions and Expulsions

Suspensions from school of ten days or less must be preceded by a brief hearing in which the student has the opportunity to tell his or her perspective on the event causing the suspension.[260] Expulsion from school is a penalty so severe that courts have required substantial due process before a student is removed.[261] As in previous years, 1983 cases in this area raise questions about whether students received adequate due process before suspension or expulsion. Courts continued to grant wide latitude to school districts in the establishment of rules to maintain order in schools and refused to intervene in several cases in which districts did not exactly follow their own procedural requirements.

The Supreme Court of Vermont considered a case in which a student was expelled and received formal written notice of the charges against him two days after the expulsion hearing.[262] The case record showed that the student did not consent the fact that he had sold marijuana in the school and that the date for the school board expulsion hearing had been agreed to by the plaintiff's father. While agreeing that the school district had now followed Vermont law regarding the formal hearing notice, the divided court refused to overturn the expulsion. To do so, the court majority argued, would "exalt form over substance."[263] Because there was substantial compliance with administrative regulations and the offense threatened the welfare of the school, the expulsion was sustained. Dissents entered by two of the five justices hearing the case argued that the requirement of written notice should not be waived.

Parents of an Illinois student expelled for possession of pills containing caffeine and ephedrine filed suit arguing that the school rule against "unauthorized drugs" was unconstitutionally vague and that the penalty was unreasonable.[264] A lower court had reversed the school board's expulsion order on the grounds that the penalty was too severe. This decision was overturned by the Illinois appeals court. While the pills carried by the student did not contain controlled substances, the appeals court nevertheless concluded that the expulsion was reasonable because of the negative effect that the distribution of any form of pills would have in the restricted environment of the school. The appeals court refused to consider the vagueness of the school rule because the issue had not been properly raised in the trial court.

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260. Goss v. Lopez, 419 U.S. 565 (1975).
261. Wood v. Strickland, 420 U.S. 308 (1975).
262. Rutz v. Essex Junction Prudential Comm., 457 A.2d 1368 (Vt. 1983).
263. *Id.* at 1372.
264. Wilson v. Collinsville Commun. Unit School Dist., 451 N.E.2d 939 (Ill. App. Ct. 1983).

In a rare decision overturning a student's expulsion, a Florida appeals court concluded that a student could not be expelled for carrying a boxed, commemorative knife to school.[265] The district had a policy requiring automatic expulsion for possessing a weapon on school grounds. The knife had been purchased by the student's father as a Christmas present for her boyfriend and was carried to school by accident when the student was showing a friend the knife at the school bus stop and the bus arrived before the student could return the knife to her home. The next step in this unusual case occurred when school officials uncovered the knife after searching the student's purse while investigating an incident involving a different student who was smoking in a lavatory. In overturning the expulsion, the Florida court concluded that the whittling knife sealed in a gift box did not meet the school's definition of knives as weapons.

School systems sometimes reduce grades in conjunction with suspension from school, and the cases that result raise questions about the student's property rights. Two high school seniors in Texas filed suit after they were suspended for three days for drinking on a school trip and had their grades reduced as well.[266] A lower court found that the grade reduction deprived the students of property rights and violated their right to substantive due process. These interesting questions were not fully addressed by the appeals court, however. Instead, the court focused on the question of whether the students had received adequate notice of the penalty, since it was not contained in the handbook of rules for the school. The court concluded that the rule had been sufficiently explained at school assemblies. The court found the substantive due process issue moot because the students had been admitted to college by the time the case was heard. Therefore, the court concluded, there could have been no adverse effect on the students' property rights.

In another grade reduction case, a student was given an "F" in music for missing two required concert performances. The student, who was vacationing with his family in Hawaii at the time of the concerts, claimed that the concerts violated his first amendment rights because they were offered in churches and contained selections of music with religious themes. A Missouri appeals court rejected these claims, noting that students claiming a religious exemption in advance had been excused from the concerts and that the music was not part of any

265. C.J. v. School Bd. of Broward Cty., 438 So. 2d 87 (Fla. Dist. Ct. App. 1983).
266. New Braunfels Indep. School Dist. v. Armke, 658 S.W.2d 330 (Tex. Ct. App. 1983).

religious service.[267] No clergy were present and no prayers were offered. The court also rejected attempts to inject substantive due process claims into the appeal, noting that they had not been raised in the trial court.

In two other suspension cases, courts confronted the markedly different issues of a no smoking rule and statutory rape. In the first, a Georgia appeals court dismissed an appeal of a suspension for smoking, holding that the student failed to exhaust state administrative appeals and that the case was moot because the student had left the state.[268] In the second, a long-term suspension of a student for assaulting a woman not connected in any way with the school, during a school vacation, was overturned.[269] The New York Commissioner of Education found that the school district had exceeded its authority in making the suspension and the court agreed.

4.8 TESTING AND PLACEMENT

The questions of whether handicapped students could be required to pass a minimum competency test before receiving a high school diploma and, if so, how much notice was required before such a system went into effect, were considered by the Seventh Circuit Court of Appeals. The case considered a policy established by the Peoria school district which required all students to pass examinations in reading, language arts, and mathematics before receiving a high school diploma. The plaintiffs in the case had received about one and one-half years' notice that the test would be administered. When they failed to pass the test, an appeal to the Illinois Superintendent of Public Instruction led to an order that they receive diplomas. This order was appealed by the school district to a federal district court, which reversed the state's decision.[270]

The plaintiffs appeals, arguing that the test requirement violated terms of the Education for All Handicapped Children Act (EHCA), section 504 of the Rehabilitation Act of 1973, and the requirements of the fourteenth amendment of the United States Constitution. The appeals court addressed each of these issues in order, concluding first that EHCA mandated only that students have access to specialized and individualized educational services. Failure to pass a competency test

267. R.J.J. v. Shineman, 658 S.W.2d 910 (Mo. Ct. App. 1983).
268. Benton v. Gwinnett Cty. Bd. of Educ., 309 S.E.2d 680 (Ga. Ct. App. 1983).
269. Board of Educ. of Millbrook Cent. School Dist. v. Ambach, 465 N.Y.S.2d 77 (N.Y. App. Div. 1983).
270. Brookhart v. Illinois State Bd. of Educ., 534 F. Supp. 725 (S.D. Ill. 1982); *see* YEARBOOK 1983 at 201-2.

was therefore not a denial of the EHCA-required "free appropriate public education."[271] Likewise the judges concluded that section 504 was an access requirement, not one that required an institution to lower or substantially modify its standards to accommodate a handicapped person. The court held out the possibility that a student's handicap might cause a modification in the way the test was administered.

Turning to the fourteenth amendment question, the appeals court found that the test requirement raised significant liberty and property interests and that sufficient notice was therefore required. The court held that one and one-half years did not allow the students an opportunity to obtain exposure to much of the material covered by the test. Instead, the court concluded, the plaintiffs' programs of instruction were geared to address individual educational needs. The circuit court therefore reversed the district court and, because several years had elapsed, making it difficult for the students to return to school, the school district was ordered to award the diplomas. While refusing to define adequate notice, the Seventh Circuit Court suggested that a school district "ensure that handicapped students are sufficiently exposed to most of the material that appears on the M.C.T., or, second, they can produce evidence of a reasoned and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on education objectives other than preparation for the M.C.T."[272]

A New York appeals court considered a similar case, addressing the question of whether three years' notice was adequate before handicapped students could be denied a diploma for failing a competency test. The local district had awarded the diplomas to two handicapped students, but this decision was overturned by the New York Commissioner of Eduction. The commissioner's action was challenged by the district but was affirmed by a lower court.[273] The school district appealed, raising a variety of objections to the state-required test. A state appeals court rejected these claims, concluding that neither EHCA nor section 504 precluded the use of such tests with handicapped students.[274] The court also rejected the fourteenth amendment claims, briefly stating that three years was adequate notice and that the state had a rational basis for the test requirement. The decision has subsequently been appealed to the New York Court of Appeals.

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271. Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 183 (7th Cir. 1983).
272. *Id.* at 187-88.
273. Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 436 N.Y.S.2d 564 (N.Y. Sup. Ct. 1981).
274. Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 458 N.Y.S.2d 680 (N.Y. App. Div. 1982).

Litigation concerning Florida's state assessment test continued in 1983. In 1981 the Fifth Circuit Court of Appeals held that the burden was on a school system to prove that the test had "curricular validity" or that it accurately reflected materials taught in the system, and that the effect of past school segregation did not influence the test scores of minority students.[275] The case was remanded to the district court for a decision on these issues. The district court, in turn, commissioned a private consulting firm to survey the teachers of the state and to examine the curriculum in each district. This lengthy study caused the district court to conclude that the state test did indeed measure what was being taught in Florida schools.[276] The court rejected arguments advanced by the plaintiffs that curricular validity could be measured only by looking at what students actually were taught, rather than what they were supposed to be taught.

Turning to the question of past discrimination, the court began by acknowledging the high failure rate of black students on the test. Plaintiffs also argued that as many as thirty percent of the teachers in Florida were overtly or covertly racist. The district court, however, concluded that there was no causal link between past school segregation and the high minority student test failure rate. The injunction against the use of the test was therefore lifted for the class of 1983.

4.9 DESEGREGATION

4.9a Systemwide Remedies

Continuing a trend seen in recent years, courts in 1983 were less likely to find fault with school district policies seeking to reduce racial segregation of students through internal plans that avoid busing. Magnet schools and voluntary transfers now represent the key tools for reducing racial imbalance. Overall, the number of cases involving desegregation also continues to decline.

Litigation concerning the segregative intent of school board policies in the San Jose, California, Unified School district continued in 1983. A federal district court had concluded in 1981 that the construction of new schools in the district, which had not reduced segregation, was not evidence of official segregative intent.[277] In arguing the case before the

275. Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981); *see* YEARBOOK 1982 at 163-64.

276. Debra P. v. Turlington, 564 F. Supp. 177 (M.D. Fla. 1983).

277. Diaz v. San Jose Unified School Dist., 518 F. Supp. 622 (N.D. Cal. 1981); *see* YEARBOOK 1982 at 167-68.

Ninth Circuit Court of Appeals, the plaintiffs pointed to the fact that the district had steadfastly refused to use busing to reduce segregation, while busing one-third of the district's children within racially distinct attendance areas. While observing that "the issue is close," the appeals court concluded that the district court was not in error in deciding that this policy was insufficient evidence of segregative intent.[278] In a dissenting opinion, one judge found segregative intent in the board's busing policy, in its failure to create magnet schools, and in public statements issued by the board in a recent school board referendum.

An omnibus desegregation plan for the city of Chicago agreed to by the federal government and the school board was approved by a federal court.[279] Having held off a decision in the case for the first year of the voluntary plan, the court concluded that the plan was adequate. The board had avoided student busing solely for the purpose of desegregation while developing a comprehensive student assignment plan, which established magnet schools, desegregated predominatly white schools, and set desegregation standards. Some all-minority schools remained under the plan, however. The court rejected arguments that the district plan placed a disproportionate burden on minority students.

In a subsequent decision attracting wide notice, the district court held that the federal government had failed to make financial resources available to the Chicago board to implement the desegregation plan.[280] The court held that this violated the consent decree entered into by the parties in the case. The government was given a final chance to comply before the issuance of an injunction.

The Eighth Circuit Court of Appeals reviewed desegregation plans for the Little Rock, Arkansas, school district.[281] At issue was an elementary school plan that resegregated four schools. The school board argued that such an approach was necessary to prevent further white flight, while the plaintiffs contended that such an argument could not be used to justify segregation. The appeals court concluded that the creation of the all-black schools was not in and of itself a constitutional violation, so long as the district sought equal educational opportunity for all students. The court suggested that this could be accomplished by establishing a second elementary magnet school, providing integrated learning experiences, and making attempts at voluntary student

278. Diaz v. San Jose Unified School Dist., 705 F.2d 1129 (9th Cir. 1983).
279. United States v. Board of Educ. of the City of Chicago, 554 F. Supp. 912 (N.D. Ill. 1983).
280. United States v. Board of Educ. of the City of Chicago, 567 F. Supp. 272 (N.D. Ill. 1983).
281. Clark v. Board of Educ. of Little Rock, 705 F.2d 205 (8th Cir. 1983).

exchanges with surrounding districts. A related Little Rock case is discussed in the next section.

As in the Little Rock case, a New York district court ruled that the Buffalo Board of Education need not bring three of the system's fifty-six elementary schools into compliance with the system's desegregation plan.[282] The court concluded that school pairings and cluster schools had largely addressed the system's segregation without causing white flight or involving forced busing. The imbalance at the three schools was not, in itself, a constitutional violation.

The Buffalo schools were also involved in a suit seeking additional funds to pay for their desegregation plan.[283] Under New York law, a school board has no independent taxing authority, but must seek funds from local governing bodies. A district court had ordered the city of Buffalo to provide the system with an additional $7.4 million, for a total of $157 million, with the extra funds to be used to implement desegregation plans. The Second Circuit Court of Appeals upheld the district court order, even though the system had not provided detailed program data explaining how the funds would be used.[284]

4.9b Cross-District Remedies

In contrast to most school desegregation controversies, which reflect a decline in community conflict and in resulting litigation, cross-district cases continued to grind forward with little hope of early resolution. The complex issues surrounding desegregation in St. Louis continued to be argued in 1983. So many appeals have been filed in the case that the parties were admonished by the Eighth Circuit Court of Appeals in 1981 to avoid filing "premature and piecemeal interlocutory appeals."[285] Both the details of the plan, which involves suburban school systems, and the question of who should pay for the costly remedy, are at issue in the litigation. St. Louis and twenty-three suburban districts reached agreement in 1983 on the transfer of a small percentage of their combined students, but both the federal government and two of the districts subsequently questioned plan details. In approving the agreement over these objections, however, the district court observed, "Expensive adversary trials ultimately deny justice to the countless deserving people. This litigation has already consumed eleven years, and absent a settlement promises to consume many more."[286]

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282. Arthur v. Nyquist, 566 F. Supp. 511 (W.D.N.Y. 1983).
283. Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982); *see* YEARBOOK 1983 at 206.
284. Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983).
285. Liddell v. Board of Educ., St. Louis, 693 F.2d 721, 727 (8th Cir. 1981); *see* YEARBOOK 1983 at 204-5.
286. Liddell v. Board of Educ., St. Louis, 567 F. Supp. 1037, 1041 (E.D. Mo. 1983).

The settlement approved by the court included the voluntary transfers, a staff hiring program, magnet schools, cooperative pairings, various grievance and enforcement provisions, and an award of attorney's fees. As to the costs, the court concluded that the city would be able to secure the $38,000,000 necessary for its share of the plan in 1983-84 without a court-ordered local tax increase. The state of Missouri was ordered to pay transportation and other costs. Following the district court decision, the state of Missouri and St. Louis County filed an application for a stay and the city of St. Louis filed an objection to the financing details. Concluding that it would be "improvident" to grant a stay in a plan that already was being implemented, the Eighth Circuit Court of Appeals refused to grant the stay.[287] As to the financing, the district court was prevented from ordering any future tax increase until the issue had been considered by the appeals court.

Litigation concerning the issues that might be argued in Cincinnati's school desegregation dispute were discussed in 1983, but a general resolution of the controversy seems years away. The district court ruled in 1982 that collateral estoppel could be invoked to prevent relitigation of whether the school board's practices from 1954 to 1965 had decided the issue.[289] The district court also concluded that nothing in two 1979 United States Supreme Court decisions[290] permitted a relitigation of pre-1965 issues. The Sixth Circuit Court of Appeals, however, reversed the district court's ruling[291] and the plaintiffs in the case sought to file an amended trial complaint.

Following remand, the district court again considered the matters that could be litigated.[292] The court concluded in its 1983 decision that plaintiffs were allowed to attempt to prove that state and suburban defendants acted with segregative intent to create, maintain, or perpetuate de jure segregation, either before or after 1965. The plaintiffs were also allowed to file claims regarding parties not currently involved in the litigation. The court also limited the claims that could be filed against the suburban school districts. Parties in the case were given ten days to file amended complaints.

In another much-litigated desegregaton dispute involving schools in Allegheny County, Pennsylvania, a federal court plan was considered

287. Liddell v. Board of Educ., St. Louis, 717 F.2d 1180 (8th Cir. 1983).
288. Bronson v. Board of Educ. of Cincinnati, 535 F. Supp. 846 (S.D. Ohio 1982); *see* YEARBOOK 1983 at 209-10.
289. Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio 1965).
290. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).
291. Bronson v. Board of Educ. of Cincinnati, 687 F.2d 836 (6th Cir. 1982).
292. Bronson v. Board of Educ. of Cincinnati, 573 F. Supp. 767 (S.D. Ohio 1983).

by the Third Circuit Court of Appeals. A multidistrict plan for desegregation had been approved by the district court,[293] which found that the standards for proving segregative intent set forth in *Keyes v. School District No. 1*[294] had been met. The appeals court approved this finding of intent.[295] The merger of five school districts into one, which had been ordered by the district court, was then challenged, however, by a citizens' group that sought to deny funds to the new district. Attempts by the citizens' groups to intervene in the case were rebuffed[296] and they were enjoined from disturbing the assets of the new system.[297]

The appellants then sought to have the district court's power to continue supervision of desegregation ended, arguing that the lower court's role ended when it created the new system.[298] The Third Circuit court characterized the appeal before it as a "frontal assault" on the whole cross-district plan. In looking at whether the district court had the power to fashion such a dramatic remedy, the court looked at the nature and extent of the constitutional violation. Having found system-wide discrimination and segregative intent in the previous drawing of district boundaries, the appeals court concluded that the lower court had properly included elementary schools and cross-district assignments in its plan. The court then scolded the appellants, noting that "persistent litigation can tear apart the social fabric of the community," and urged that the parties turn away from further lawsuits.[299]

Questions concerning which parties should be defendants in a case involving segregation in the Little Rock school district and surrounding districts were answered by a federal court.[300] The court concluded that an interdistrict violation would mandate an interdistrict remedy and refused to exclude the Pulaski County District from the suit. The court did conclude, however, that the state of Arkansas was not properly a party because it had not given its consent to be sued. The state board of education was left as a defendant. The court also announced that it would consider the appointment of its own expert to help it address the case.

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293. Hoots v. Pennsylvania, 545 F. Supp. 1 (W.D. Pa. 1981).
294. 413 U.S. 189 (1972).
295. Hoots v. Pennsylvania, 672 F.2d 1107 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 55 (1982).
296. *Id.* at 1133.
297. Hoots v. Pennsylvania, 535 F. Supp. 1194 (W.D. Pa. 1982).
298. Hoots v. Pennsylvania, 703 F.2d 722 (3d Cir. 1983).
299. *Id.* at 728.
300. Little Rock School Dist. v. Pulaski Cty. Sp. School Dist. No. 1, 560 F. Supp. 876 (E.D. Ark. 1983).

4.9c Developments Under *Swann* and *Keyes*

In a case that applied the standards contained in *Keyes*,[301] a federal court held the Benton Harbor, Michigan, area school district guilty of increasing de jure school segregation.[302] The 1978 decision found the district had assigned teachers by race, had engaged in discriminatory boundary changes, and had facilitated the transfer of white students to further segregation. The state was ordered not to pay the tuition aids for students who had left the Benton Harbor district under these circumstances. In a 1981 decision, the district court ordered desegregation that involved three other districts included in the dispute, establishing a voluntary magnet plan.[303]

The lower court decision was then reviewed by the Sixth Circuit Court of Appeals, which made its decision early in 1983.[304] The issue was complicated by the fact that the district judge hearing the case had changed before the 1981 case was decided. While the court's opinion called for a voluntary settlement, an opinion prepared by the former judge but not issued required a mandatory interdistrict remedy merging three of the districts. Plaintiffs urged the appeals court to order the merger, arguing that the new judge assigned to the case was "unfamiliar with local conditions" and overly fearful of busing. In deciding the case, the appeals court quoted long passages from the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*[305] on the nature of the remedies to be ordered in desegregation cases. The court finally decided that the lower court plan of voluntary desegregation for the bulk of the districts was not inappropriate. The opinion ended by observing that the Michigan State Board of Education had an affirmative role to play in the magnet school compromise and that the lower court might have to order mandatory steps if the voluntary ones were not taken.

Further motions in the Benton Harbor case were subsequently heard by the district court.[306] At issue were the questions of who should pay the student transportation costs, teacher incentive salaries, and other fees and charges. These were apportioned among the defendants. A request by the state that the court's original 1981 order be vacated was

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301. Keyes v. School Dist. No. 1, 413 U.S. 189 (1972).
302. Berry v. School Dist. of City of Benton Harbor, 467 F. Supp. 630 (W.D. Mich. 1978); *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1980] at 222-23.
303. Berry v. School Dist. of City of Benton Harbor, 515 F. Supp. 344 (W.D. Mich. 1981); *see* YEARBOOK 1982 at 172.
304. Berry v. School Dist. of City of Benton Harbor, 698 F.2d 813 (6th Cir. 1983).
305. 402 U.S. 1 (1971).
306. Berry v. School Dist. of City of Benton Harbor, 564 F. Supp. 617 (W.D. Mich. 1983).

rejected, with a comment by the court that neither the facts nor common sense would permit such an interpretation of the court of appeals decision. The state had sought to interpret the decision as making their participation optional.

A 1981 desegregation plan for Nashville approved by a district court allowed neighborhood schools for grades K-4 that were racially segregated and required only fifteen percent of either race in middle and high schools.[307] On appeal, the Sixth Circuit Court of Appeals, citing *Swann*, as modified by the formula contained in *Columbus*, concluded that additional desegregation was required.[308] The district court in 1983 considered a plan developed by the school board to meet the objections of the appeals court.[309] The revised plan followed *Columbus*, allowing no more than fifteen percent deviation on either side of the percentage of minority students in the district, except in cases where long transportation was involved. Neither the plaintiffs nor the state defendants objected to the system's plan, which was formally adopted by the court. It appears, then, that the desegregation dispute in Nashville, which started in 1955, is no longer before the federal courts.

Attorney fees and other collateral issues in the Nashville case, however, remain to be fully decided. In an opinion on this subject, the district court awarded attorney fees for the period 1972 to the present, noting that the court in 1972 had entered a "final order" in the case at that time.[310] Attorney fees were awarded at current prevailing rates. Fees for the plaintiff's consultants were not allowed, nor were costs related to appeals, which were referred to the court of appeals for resolution.

4.9d Fifth Circuit Cases

While school desegregation issues are nearing resolution in many parts of the country, some of the long-standing suits in the Fifth Circuit are far from settlement. In 1981 a Louisiana district court rejected a federal government request to modify the court's original 1971 desegregation order requiring school desegregation in Rapides

307. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 511 F. Supp. 1363 (M.D. Tenn. 1981); *see* YEARBOOK 1983 at 211-12.

308. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 687 F.2d 814 (6th Cir. 1982).

309. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 572 F. Supp. 317 (M.D. Tenn. 1983).

310. Kelley v. Metropolitan Cty. Bd. of Educ. of Nashville and Davidson Cty., 558 F. Supp. 468 (M.D. Tenn. 1983).

Parish.[311] The court's plan involved pupil transfers, staffing changes, and the closing of two schools, one serving predominantly white children and one serving black students. Both parties appealed and in 1982 the Fifth Circuit Court of Appeals rejected part of the lower court decision.[312] On a motion for rehearing, the entire lower court decision was vacated and the case was remanded.[313] Following a post-remand evidentiary hearing, the district court considered alternatives proposed by the parties and readopted its original plan. The parties again appealed, focusing on the closing of the mostly white elementary school.

In this appeal the Fifth Circuit Court agreed with the lower court and affirmed the plan.[314] The school board alternative, which involved substantial minority student transportation, would have unfairly burdened the minority students, the court concluded, and other alternatives would have ended the school desegregation efforts. The court's plan, "developed with precious little of the assistance it had a right to expect from the parties," avoided these problems. One of the three judges hearing the case dissented, observing in part that "the existence of great power does not permit its fullest exercise in every case."[315] The dissent that the district court had ignored previous orders from the appeals court to reduce the sweep of the remedy.

The twenty-year-old school desegregation case involving East Baton Rouge made its way to the Fifth Circuit Court of Appeals for the fourth time in 1983. Attempts by the parties to agree on a settlement had failed and the court ordered its own plan implemented in 1981.[316] The court's plan was modified slightly in 1982.[317] The plan eliminated all one-race middle schools and all but two one-race high schools. All parties to the case except the federal government appealed portions of the lower court's order, and a new citizens' group sought to intervene in the case.

On appeal, the Fifth Circuit affirmed the lower court's decision.[318] Observing that the district had built seventy-six new schools since 1954, seventy-three of which were essentially for one race, the appeals court found this to be ample evidence of segregative intent. Under the

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311. Valley v. Rapides Parish School Bd., 499 F. Supp. 490 (W.D. La. 1980); *see* YEARBOOK 1982 at 177.
312. Valley v. Rapides Parish School Bd., 646 F.2d 925 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *see* YEARBOOK 1982 at 177.
313. Valley v. Rapides Parish School Bd., 653 F.2d 941 (5th Cir. 1981).
314. Valley v. Rapides Parish School Bd., 702 F.2d 1221 (5th Cir. 1983).
315. *Id.* at 1231.
316. Davis v. East Baton Rouge Parish School Bd., 514 F. Supp. 869 (M.D. La. 1981); *see* YEARBOOK 1983 at 213-14.
317. Davis v. East Baton Rouge Parish School Bd., 533 F. Supp. 1161 (M.D. La. 1982); *see* YEARBOOK 1983 at 213-14.
318. Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983).

holdings in *Keyes* and *Swann*, the appeals court found the district had an obligation to correct the racial imbalance and the system's plan to leave thirty-nine one-race schools was unacceptable. The court's plan, which left thirteen schools untouched, in turn was assailed as insufficient by the NAACP intervenors, but was sustained by the appeals court on the ground that there were sufficient reasons for excluding each of the schools. The lower court's decision not to permit additional parties to enter the case was also upheld.

Desegregation in Ector County, Texas, was furthered by a consent decree entered into by the parties in 1970, and the issue lay dormant until 1981 when a citizens' group filed a motion alleging that the school district had violated the terms of the 1970 agreement. The district court allowed a second parents' group to argue the opposite perspective as amicus curiae, but not as a party in the case, and hearings were held. After a number of intermediate steps, the United States and the county agreed to a new plan, which was then appealed to the Fifth Circuit by the group that had reopened the litigation.[319]

The challenged plan converted an all-minority high school into a junior high school, transferred some of the high school students into a previously all-white school, and established an elementary magnet school. The citizen's group bringing the suit sought a solution involving pairings and busing. The group formed in response to this plan sued to overturn the lower court's decision denying them permission to intervene. The appeals court answered these sundry claims by remanding the case. It concluded that the lower court had improperly denied intervention to the second group without granting a hearing and that all parties should have the right to participate in a hearing on the plan.

Smoldering desegregation issues in Denison, Texas, also re-emerged after years of apparent calm. At issue was a court-monitored elementary school assignment plan for the district's seven elementary schools and the racial composition of the administrators in those schools. The lower court's final order was based on expert testimony in a different case in another district. The testimony was applied by the district court to the Denison situation, even though Denison had a large white majority in all its schools, unlike the other district. The Fifth Circuit Appeals Court concluded that the lower court had issued the order without considering local conditions, applying an erroneous view of the law.[320] On remand, the lower court was instructed to assess the segregative intent of local school officials and to allow all parties to supply additional information. Questions on the hiring of principals

319. United States v. CRUCIAL, 722 F.2d 1182 (5th Cir. 1983).
320. Price v. Denison Indep. School Dist., 694 F.2d 334 (5th Cir. 1983).

were also remanded, with instructions that the district court should consider the hiring pool, not the racial composition of the district's student body.

The largely minority student Houston school district was declared to be unitary by a federal district court judge in a 1981 memorandum opinion, which was then appealed by plaintiffs in the case. Previous school desegregation had failed, in part, when white flight eroded paring attempts. The final plan, then, left a number of one-race schools and did not require cross-district busing. The Fifth Circuit allowed the plan to stand, however, concluding that the district had made a good-faith effort and that further actions would not be effective in a district with a rapidly expanding minority population surrounded by racially stratified suburbs.[321]

In another Texas case, a decision that the Dallas system had not yet achieved unitary status was reviewed by the Fifth Circuit. The district court had rejected a major busing alternative[322] and accepted a plan allowing minority students to remain in their neighborhood schools for grades four through eight.[323] A tri-ethnic committee overseeing desegregation was disbanded by the court in 1982.[324] The case then returned to the Fifth Circuit Court of Appeals for review of these actions.[325] In addressing whether the district had become unitary, the appeals court noted that the district still opposed student reassignments, "no matter how feasible or how minimal." Thus the appeals court concluded that while the decision "cannot be indefinitely postponed," the district court was within its bounds in not reaching such a conclusion in 1981. The appeals court also accepted the plan for grades four through eight but rejected a small part of the plan calling for reassignment of students in one high school nearing an acceptable percentage of minority students. The case was returned for a decision on the question of unitary status.

Attempts to set aside a consent decree and to intervene in the case involving the desegregation of schools in Caddo Parish, Louisiana, were rebuffed by the Fifth Circuit.[326] The majority opinion held that litigation "must end at some point" and concluded that the plaintiff had ample opportunity to participate during the previous sixteen years of the litigation. A dissenting opinion, however, stressed that the interests of minority children were not adequately represented by the federal

321. Ross v. Houston Indep. School Dist., 699 F.2d 218 (5th Cir. 1983).
322. Tasby v. Estes, 520 F. Supp. 683 (N.D. Tex. 1981); *see* YEARBOOK 1982 at 176.
323. Tasby v. Wright, 542 F. Supp. 134 (N.D. Tex. 1982); *see* YEARBOOK 1983 at 212-13.
324. Tasby v. Wright, 559 F. Supp. 9 (N.D. Tex. 1982).
325. Tasby v. Wright, 713 F.2d 99 (5th Cir. 1983).
326. Jones v. Caddo Parish School Bd., 704 F.2d 206 (5th Cir. 1983).

government, leaving a "disembodied class of black students . . . seeking vainly to vindicate their constitutional right to attend desegregated schools."[327] No hearing was held on the intervention motion. The minority also held that, because the government had changed its opinion three times, the appellant had no way of knowing whether or not the intervention motion was needed until the decree was announced. The majority in the case, however, held that the motion was not filed in a timely fashion.

The Georgia NAACP filed suit alleging that minority students were being assigned to classes and programs for the educable mentally retarded solely because they were black.[328] This practice was alleged to be occurring across the state of Georgia and the plaintiffs sought a summary judgment to halt the practice, alleging that it was an extension of prior discrimination against black persons. In response, defendants argued that present discriminatory intent must be proved.

Confronting these conflicting claims, the district court characterized the issue as a type of "second generation" desegregation problem on which little case law had been written. After some discussion, the court observed that *Keyes* held that the existence of subsequent segregated schooling in a system where there was intentional racial discrimination in a meaningful portion of the system created the presumption that the new segregation is the result of intentional acts. On the other hand, the district court was not prepared to take "the great leap of faith" required for the issuance of a summary judgment in the case. In calling for a full hearing in the case, the court also ruled that the plaintiffs had raised viable section 504 claims and that the prerequisites were not met for the use of offensive collateral estoppel on the issue of the alleged misclassification of black students.

In a memorandum opinion, a Texas district court approved a plan to further desegregation in Fort Worth.[329] The plan was unique, in that it was developed by an independent Citizens' Advisory Committee, working without influence of any party to the desegregation dispute. The plan reduced busing, closed schools, and spent the funds saved from these actions on improvements designed to increase educational quality. All parties to the previous litigation approved the plan.

4.9e State Courts

In 1963 the Illinois legislature adopted the Armstrong Act, which required school districts to change their internal school boundaries to

327. *Id.* at 224.
328. Georgia NAACP v. Georgia, 570 F. Supp. 314 (S.D. Ga. 1983).
329. Flax v. Potts, 567 F. Supp. 859 (N.D. Tex. 1983).

further school desegregation. The state board subsequently required all districts to change their boundaries such that no school would have fifteen percent more or less minority students than the district as a whole. The state also threatened to withhold funds from districts not in compliance. To confound the situation, a 1977 legislative act, the Moore Amendment, prohibited school districts from busing children solely to further desegregation.

Two separate cases challenged the state rule implementing the Armstrong Act. Both appeals court decisions held that the fifteen percent requirement was arbitrary and violated the Moore Amendment.[330] The courts concluded that desegregation was one of several factors properly considered when attendance boundaries were set. The cases then were joined for appeal to the Illinois Supreme Court. In deciding against the state board, the Illinois high court concluded that the board was without authority to promulgate rules to enforce the Armstrong Act.[331] It was up to local districts to comply with the act directly, and the state board, the court concluded, was entitled only to refer discrimination cases to the state attorney general for prosecution. Broad statutory authority allowing the state board to set rules on the "operation of the public schools" did not include desegregation, the court added.

A Florida court considered a challenge to school boundary changes that were enacted by a county school board.[332] The changes served to maintain racial balance in Broward County high schools. The parents filing the suit argued that a fully desegregated system need not be concerned if resulting demographic shifts changed the racial balance in the schools. In addressing this claim the court concluded that the board may not have been obligated to redraw the boundaries but could do so because maintaining the racial mixture was a legitimate exercise of board policy-making powers. The parents' remedy, then, was political, not judicial.

330. Aurora East Pub. School Dist. v. Cronin, 415 N.E.2d 1371 (Ill. App. Ct. 1981); Chicago Heights Pub. School Dist. v. Illinois State Bd. of Educ., 422 N.E.2d 898 (Ill. App. Ct. 1981); *see* YEARBOOK 1981 at 179.

331. Aurora East Pub. School Dist. v. Cronin, 442 N.E.2d 511 (Ill. 1982).

332. Plantation Residents Ass'n v. School Bd. of Broward Cty., 424 So. 2d 879 (Fla. Dist. Ct. App. 1983).